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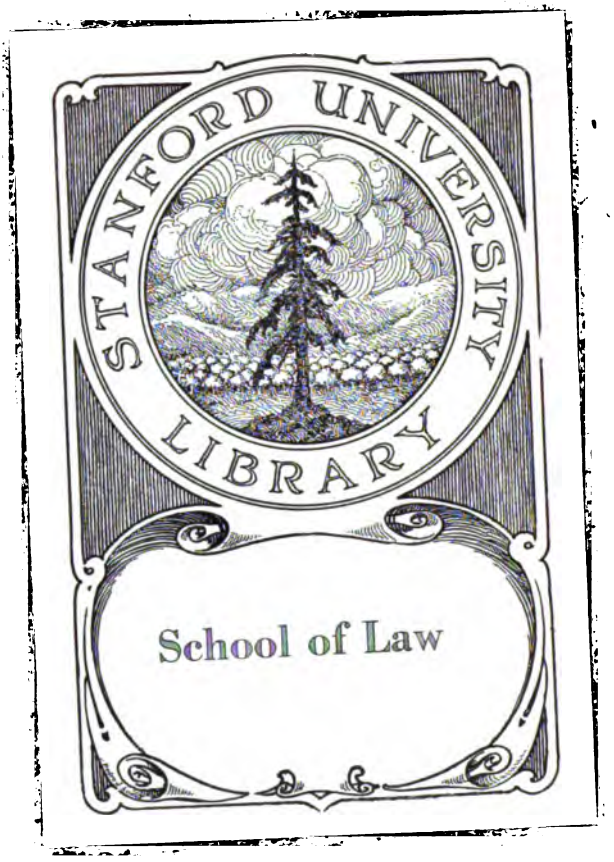
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THE CANADA LAW JOURNAL

EDITOR:
HENRY O'BRIEN, K.C.

ASSOCIATE EDITOR:
C. B. LABATT

VOL. XLVII

1911

TORONTO:
CANADA LAW BOOK COMPANY, LIMITED
LAW PUBLISHERS
32-34 TORONTO ST.

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Canada Law Journal.

VOL. XLVII TORONTO, JANUARY 2. No. 1.

SHOULD CAPITAL PUNISHMENT BE ABOLISHED?

How to punish crime, and, at the same time, reform the criminal, is a problem demanding the most earnest consideration by the statesman, the philanthropist, and the social reformer. Towards the solution of this problem some progress has been made, but, so far, with very trifling results. What has chiefly been accomplished is the arousing of public interest in this important question which has caused the abolition of the death penalty for all minor offences, and of the abuses which so long disgraced the treatment of criminals, whether awaiting trial, or after conviction. In fact, we are now in danger of going to the other extreme, and allowing sentiment to usurp the place of justice.

This error is almost as bad as the first; for if, instead of treating the criminal with such harshness and severity as only to have the effect of hardening his heart and confirming his evil propensities, we lead him to think lightly of his crime, and to fancy himself a victim to oppression, we are as far as ever from arriving at the end in view. What we should strive for is, of course, while punishing the criminal for his offence, not at the same time to condemn him as well to infamy for the rest of his life, and so leave him little recourse but continuance in crime. Our object should be to take care to open a door by which he may, after punishment, enter upon a new career—not of crime, but of good conduct. We should give him a ray of hope, not the blackness of despair, and hold out a hand to help, not to crush down.

To effect this the penalty must be justly proportioned to the offence; it must be certain, and be strictly carried out; no mere sentimentality must be permitted to interfere with, or mitigate it, at the same time it must not be aggravated by unkindly

treatment; all tendencies to right feeling must be encouraged, but not be accepted as giving a claim for commutation of sentence. Then, when once the punishment is over, reformation must begin, or, at least, a way for reformation must be given. There must be offered a means of escape from the dangers which beset the path of the man or woman, and still more the boy or girl, when they emerge from the prison gates, and are at once exposed to the temptations of their former life and former associates, and to the frowns of a censorious world, so ready to prove its righteousness by refusing forgiveness to those who have erred. How to bring this about is the task before us, and so far the effort has not been successful, not from the want of desire but from the failure to find any efficient method of operation.

With such ideas in view how are we to approach the subject of capital punishment? Clearly we cannot hang a man first, and then proceed to reform him, any more than we could first hang him, either literally or metaphorically, and then go on with his trial. The strongest argument against capital punishment is that by the punishment we close the door against reformation. How dare we, erring mortals, assume such responsibility? The reply is that there are crimes of such a character that he who, not in the heat of passion but of intent, commits them, puts himself out of the pale of human sympathy, or human indulgence. By Divine law the murderer is condemned to death, and by his fellow man shall the condemnation be carried out. "He that sheddeth man's blood by man shall his blood be shed." Was this law set aside by the new dispensation? Has it more authority now than the law which decreed "an eye for an eye, a tooth for a tooth"? We venture to suggest by the way that such punishments for such offences would perhaps be more deterrent than that now awarded of the usual formula—a fine of so much or so many months in jail. How far the Mosaic law should prevail with us is a fair question for argument, though we have a judicial dictum to the effect that our Provincial Assembly is not bound by the Ten Command-

ments. But whether in regard to capital punishment for the crime of murder we are bound by the Mosaic law or not, we certainly have its authority in support of the penalty of death, and, as a matter of expediency, our experience supports it also as the most effective safeguard against the commission of the crime.

It has been said that the worst use to which you can put a man is to hang him, but this is a very materialistic view of the case, and not more to be regarded that the modern sentimentalist who, like Tolstoi in his latest utterances, inveighs against the brutality of capital punishment, and uses every effort to prevent its infliction. Such people move heaven and earth to save the life of a Crippen, but do not spend a thought upon the brutality, the fiendish cruelty of his crime, or the effect upon the public mind of such a monster in human form being regarded as a fit subject for merciful consideration.

But putting aside for the present the question as to our right to inflict the death penalty, and the views of those who regard with abhorrence the idea of deliberately putting a criminal to death, no matter what his offence may have been, we turn to the practical question—Is the death penalty the most effective form of punishment as a prevention of the crime of murder, not to speak of other crimes of which there are some equally deserving of such a penalty?

In a pamphlet recently published by Mr. Arthur Macdonald of Washington, D.C., a well-known criminologist, we find this subject very fully dealt with in the light of the most recent and reliable figures taken from the criminal records of all countries from which such are obtainable. The conclusion at which the writer arrives is that "viewing the world as a whole the official statistics of leading countries shew a general increase of crime in the last thirty years, while severe punishments have become less and less in number," "but there are not as yet sufficient data to determine the influence of the death penalty." On the other hand he says, "In an extensive visitation of prisons both here (in America) and in Europe,

living in the institutions, talking freely with the most intelligent wardens, keepers and criminals, I do not remember one who did not believe in the utility of the death penalty in its effect upon certain classes of criminals, especially the professional criminal."

It is with the professional criminal, in whose case murder is as it were something incidental to his main object, a means to an end not the end itself; with the man who deliberately commits murder from motives of revenge, or to gain some ulterior object; or with the man of low and debased nature, for whom the sanctity of life of any kind has no meaning, who will beat to death his wife or his mother, or any one who angers him, that we have to do in considering this question. In all these cases it is the certainty of the punishment that has the effect desired. To such persons life penalty has comparatively no terror. They are prepared to risk it, for there is always the chance of escape, or of commutation, but from the gallows there is no escape. Again they are but human, and being human they fear death. Being criminals they fear for the future, for which they have no hope, and they would put off the evil day as long as possible.

In cases such as those above described the death penalty has been found by the experience of all countries, as shewn by the writer referred to, to have been at times necessary for public security, and in many countries where it had been abolished it was found advisable to restore it.

The writer referred to is very guarded in his conclusions, and hesitates in making a positive pronouncement, but from all he says, and for the reasons above adduced, we may safely conclude that while the infliction of capital punishment should be watched with care, no trifling considerations should be allowed to take away the certainty of that penalty following the sentence of death to be pronounced upon those who have been convicted of murder.

Shanty Bay. W. E. O'Brien.

THE STATUTE OF LIMITATIONS AND THE LAND TITLES ACT.

Section 32 of the Land Titles Act provides that "*a title to any land* adverse to or in derogation of the title of the registered owner shall not be acquired by any length of possession."

Prima facie the meaning of this would seem to be that a registered owner's title cannot be affected by an adverse possession of the land in question. The object of the Act is undoubtedly to make the register such conclusive evidence of ownership that it cannot (except in cases of fraud) be controverted by any extrinsic fact. It is, however, not explicitly stated that as to registered land the Statute of Limitations is altogether abrogated. The section is dealing only with the title of land and even as regards land it may possibly be found that the section is not quite so far-reaching as it at first sight appears to be. For while it may be true that possession per se may not be sufficient to give any title to land no matter for how long it may have been held, as against any one dealing with the registered owner, non constat, that it may not give to an adverse possessor for ten years or upwards, a right to apply to be registered as owner in the place of the registered owner who for the statutory period has made no claim. The main and principal object of the Land Titles Act is to make the register conclusive evidence of ownership to all persons dealing with registered owners. But it may be doubted whether it is the purpose of the Act to allow registered owners to slumber on their rights, and permit others to enter into possession and acquire such a possession that under the Statute of Limitations the owner cannot evict them. The Statute of Limitations does not profess to confer any title on a possessor, but it bars the rightful owner from bringing an action to disturb the possessor unless he brings it within the specified time—and the legal result of this is to vest the title in the possessor for the statutory period. The Land Titles Act does not expressly repeal that enactment as regards registered land—but it is certain that un-

less a person who has had possession for the statutory period has got himself registered as owner, he cannot deal with the land as owner, so as to give a good title. But as we have said, it may be, that possession, though of itself insufficient to give title, may yet be found to give the possessor a right to apply to be registered as owner. Under the English Act, it is now made clear that it does. Originally, there was a section in the English Act corresponding to s. 32 in the Ontario Act, but that section has been now amended so as to read as follows (the words in brackets indicate the amendments): "12. A title to registered land adverse to or in derogation of the title of the registered proprietor shall not be acquired by any length of possession [*and the registered proprietor may at any time make an entry or bring an action to recover possession of the land accordingly.* Provided that where a person would but for the principal Act, or of this section, have acquired a title by possession to registered land he may apply for an order for rectification of the register under section 95 of the principal Act, and on such application the court may, subject to any estates or rights acquired by registration for valuable consideration in pursuance of the principal Act or of this Act, order the register to be rectified accordingly.] And provided also that this section shall not prejudice as against any person registered as first proprietor of land, with a possessory title only, any adverse claim in respect of length of possession of any other person who was in possession of such land at the time when the registration of such first proprietor took place."

This amendment seems to make it clear that a title may now be acquired in England by possession even under the Land Titles Act, but such a title is not complete until the person who acquires it gets himself registered as owner.

Having regard to the purpose of our Land Titles Act, and to the fact that our Act does not contain any words enabling a registered owner to sue for the recovery of registered land after the expiration of the statutory period, and also the fact that the Land Titles Act does not expressly repeal the Statute

of Limitations in respect to land registered under the Act, it would seem that the court will in some way have to harmonize apparently conflicting enactments, and in order to do so it may be found that the only way to do it is to read section 32 as if it were in fact worded in accordance with the amendment made to the English Act.

The absolute security of all persons dealing with a registered owner, does not require that the registered owner should himself be protected against the results of his own laches. The purpose of the Act would be sufficiently answered, if all persons dealing with a registered owner shall be protected against unregistered possessory claims. What in such circumstances would be the rights of a purchaser from a registered owner as against a person in possession, whom the registered owner had lost his right to evict? It would seem that, in order to give due effect to the Land Titles Act, that as to the purchaser a new start must be taken to be given to the Statute of Limitations on his registration as owner, for as to him the right of entry would not accrue until he became the registered owner. With regard to persons acquiring rights to charges on registered land the proper view would seem to be that the register cannot be relied on as guaranteeing in any way the amount due, and anyone dealing with the registered owner of a charge does so subject to the state of accounts between the owner of the land and the chargee, and a transferee of a charge does not thereby acquire any fresh starting point for the Statute of Limitations but will take subject to any rights which the owner may have acquired or be acquiring under the statute. But as regards the ownership of the land itself, in order to work out the Land Titles Act each registered owner must be held to have an independent right and is not to be treated as claiming under or through any predecessor in title as under the common law system, nor is he to be affected by any claims or rights acquired by other persons by possession, or otherwise, which do not appear on the register. At least that appears to us, the only way in which reasonable effect can be given both to

the Land Titles Act and to the Statute of Limitations, unless it can be held that as to land registered under the Land Titles Act the Statute of Limitations has no application—until that has been actually determined it would seem to be the part of prudence for registered owners not to assume that the Statute of Limitations is repealed as to registered land. The Statute of Limitations has been recently revised and it makes no exception in favour of registered land.

THE ONTARIO RAILWAY AND MUNICIPAL BOARD.

All respectable people must be disgusted with the abuse which certain irresponsible journalists "of the baser sort" have heaped upon the members of the Ontario Railway and Municipal Board for their action in connection with some local grievance, or alleged grievance, in the city of Toronto. It is of course, useless to attempt by any protest to check such intemperate and uncalled for language; but, all the same, a protest should be made, and those who have any regard for their country's welfare should in every possible way seek to shew their reprobation of such unworthy and cowardly literature. Cowardly it certainly is, for not one but a coward would think of striking a man whose hands are tied; but this is exactly what these journalists have done. The Board being a quasi-judicial body cannot take any notice of such attacks; and even should they desire to do so, it has recently been held by Mr. Justice Garrow that the Board is not a "court" and cannot, therefore, commit for contempt. Such attacks as those we refer to are not criticisms but simply vulgar abuse, and must arouse, or at least tend to feed, the passions of unthinking and ignorant people. Perhaps the most objectionable feature of such literature is that it tends to break down that respect for authority and confidence in the courts of justice, the decadence of which marks the road to anarchy.

The Ontario Railway Board has recently been very much in the limelight, but it may safely be said, without fear of contra-

diction, that its decisions have been markedly fair, judicial and impartial, as well as shewing that independence of popular clamour and the broadness of mind to review, if thought well, their own decisions necessary to secure the impartial administration of the many important matters of a public nature which come before it. This is not the first time that writers of the class above referred to have sought to hamper and unduly influence the members of this Board; but they have gone on in the even tenor of their way without fear, favour or affection, and are as much entitled to respect as any Court in the land.

Whilst speaking of the above matters it is not inappropriate in connection with them to refer to the riotous scenes which have recently disgraced the fair name of the city of Toronto. These were largely due to language of the character above referred to, aggravated by the fact that those seeking municipal honours in that city are in the habit of courting the assistance of these sensational journals, in the belief that it will be of service to them in catching the vote of those who are supposed to be, and too often are, influenced by the clap-trap arguments and socialistic utterances of those objectionable developments of modern newspaper enterprise.

BRITISH AND AMERICAN CONSTITUTIONS COMPARED.

Nothing human is perfect; which threadbare statement is as true in matters national as in matters municipal or individual.

Recent events have brought into prominence some of the imperfections of the constitution of the United States. We have formerly alluded to a serious defect in the constitution of the Dominion of Canada, in respect of which that of the United States is certainly superior. We may refer to that subject again, but, at present, an ardent representative of the much "tail-twisted lion" must be permitted without offence to contravene the French exhortation, "Melez vous de vos affaires."

We are not prepared, however, to accept all his conclusions. The argument is as follows:—

By the recent elections in the United States it has been made perfectly manifest that the House of Representatives no longer represents the majority of the people of the United States, and yet for another year this House will continue to legislate, although it has ceased to enjoy the confidence of the people. Compare this with the British system. The House of Commons is dissolved and a new House is elected. As soon as the political complexion of the new House is manifest, the government, if it is in a minority, resigns and a new government enjoying the confidence of a majority in the House of Commons, takes its place. The popular will thus finds an immediate response. But under the United States system it takes many months before real effect can be given to the popular will. The President and his advisers who at the time of their election, represent the political views of the electors and who in some measure control legislation, may, before their term of office expires, cease to command confidence, but whether they do, or not, they practically hold office for a term certain and until it has expired the will of the people practically cannot be carried into effect, whereas, under the British system, almost immediate effect is given to it. We have reason to feel satisfied that in Canada we have followed British, rather than American, precedent in forming our constitutional system.

But there is also another difficulty arising from the limited legislative powers of both Congress and the States legislatures. According to the British system, Parliament is supreme, its powers are unlimited and bounded only by the impossible. But both in the United States and Canada, the Federal and Local Acts are subject to judicial construction as to whether or not they are ultra vires; and this produces a very serious difficulty in the United States, though not so in Canada, and instead of being a protection to the rights of the people, it may prove, on the contrary, a means of really thwarting their will.

This aspect of the case has been shewn in more than one episode of the political history of the United States, and it is even now at the present time threatening the cause of true progress and enlightened legislation, as is very forcibly pointed out by ex-president Roosevelt in the recent issue of the *Outlook*. He refers to the New York bakeshop case, where the New York legislature had passed an Act to compel the carrying on of the business of bakeshops in the State in a manner and under conditions that would promote the health and comfort of the employees, and the Supreme Court by a majority of five to four declared the Act to be ultra vires, because it interfered with the liberty of men to work under conditions hurtful to their health. If this decision holds, and there is no appeal from it, except to the court itself in some other case, then the will of the people to provide better conditions for this class of work-people is practically frustrated for all time, or until some amendment can be made to the constitution. Because it is not as if some other legislative body, federal or local, had power to legislate in the direction aimed at, so long as the decision stands, it means that no legislature, federal or state, has jurisdiction to deal with the matter. Such a condition of things, however, could not arise in Canada, because the question for judicial decision would be which of two legislatures has the legislative power in the matter in question, and though the Act of the Federal or a local legislature might be held ultra vires, that would not mean that there was no legislative control over the subject-matter in question, but merely that the wrong legislature had assumed to deal with it, and it would still be competent to the proper legislature to legislate regarding it, without any constitutional amendment. This seems to indicate a further point of superiority of the British idea of constitutional government, to that by which the American system is governed.

CRIMINAL RECKLESSNESS.

Mr. Lewis has again introduced in the House of Commons of Canada, his amendment to the Criminal Code, whereby he seeks to provide that—"Every one is guilty of an indictable offence and liable to two years' imprisonment who injures by shooting any person, although the person charged believed the object he was aiming at was a deer, moose, or other animal." Any one who is either so idiotic or so reckless as to shoot (as so many have done lately) a man instead of a beast of the field, would get nothing more under the above provision than what is due to him.

The Criminal Code should also be amended by making a similar provision for reckless drivers of automobiles. Punishment by the infliction of a fine is admittedly inadequate and useless as a preventive. Any person owning an automobile is well enough off to pay a small sum of money for the pleasure of rapid driving, or for the pleasurable excitement of seeing how narrowly he can escape killing some one. Very large sums have been paid as fines without any marked dimunition of such offences, and the police authorities say that something more drastic is necessary. The regulations on this subject in England are much more stringent than here, and some Canadian legislator would do well for his country if he were to take this matter up and introduce that system here, or, in some way, insist upon more stringent provisions than the present entirely insufficient ones. If we happily lived in the "wild and woolly west," there would soon be an end of this sort of legalized brutality, for it would simply be a case of "shooting on sight."

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

VETERINARY SURGEON—ONE MAN VETERINARY COMPANY—UNQUALIFIED PERSON MANAGING DIRECTOR—MANAGING DIRECTOR DESCRIBED AS "SPECIALIST"—INJUNCTION—VETERINARY SURGEONS ACT, 1881, (44-45 VICT. c. 62) s. 17—(R.S.O. c. 184, s. 3).

Attorney-General v. *Churchill's Veterinary Sanatorium* (1910) 2 Ch. 401 was an action to restrain a breach of the Veterinary Surgeons Act, 1881 (44-45 Vict. c. 62), s. 27; (R.S.O. c. 184, s. 3). The defendant company, a limited company, was organized by an individual who was the sole member and managing director, and claimed to be a school of veterinary art, in which, the anatomical structure of horses, cattle, sheep, dogs and other domesticated animals, the diseases to which they are subject and the remedies proper to be applied are investigated," and on the window of the business premises of the company was inscribed "James Churchill, managing director, M.D., U.S.A., specialist." The action was brought to restrain the company and the managing director from holding out the company as being conducted by persons qualified to practise the art of veterinary surgeons. Neville, J., who tried the action, held that though the company was not a "person" within the meaning of s. 17 or liable to prosecution under the Act, yet it might nevertheless be restrained as prayed from falsely holding out to the public that the individuals who comprise or are employed by it are legally qualified veterinary surgeons; and he accordingly granted the injunction. It may be remembered that according to the Interpretation Act "person" in Ontario Acts includes a "corporation": 7 Edw. VII. c. 2, s. 7(13).

PRINCIPAL AND AGENT—LIMITED COMPANY EMPLOYED AS AGENT—COMPANY EMPLOYING ITS OFFICIALS—PROFITS OF OFFICIALS NOT RECOVERABLE AGAINST PRINCIPAL.

In *Bath* v. *Standard Land Co.* (1910) 2 Ch. 408, the principle that an agent cannot make a profit for himself beyond the remuneration fixed by the contract was held to preclude a corporation employed as agent from recovering from its principal remuneration paid to its own officials. The facts of the case were, that the plaintiff had employed the defendant company to

manage and develop his estate, and the company, having power by its articles of association so to do, employed one of its directors to act as solicitor, and another to act as an estate agent, and another to act as auctioneer, at the usual rates of remuneration for such services. These charges the company sought to charge against the plaintiff in addition to the remuneration contracted for, as necessary disbursements; but Neville, J., held that, as regards all profit charges paid to the directors, the company had no right to recover them as against the plaintiff, the directors as he said being but the "brains" of the company itself.

WILL—TESTAMENTARY PAPER—EFFECT OF PROBATE—LIST OF NAMES AND PECUNIARY AMOUNTS ADMITTED TO PROBATE AS CODICIL.

In re Barrance, Barrance v. *Ellis* (1910) 2 Chy. 419, Parker, J., was called on to consider the effect of a document setting out a list of names with sums of money opposite to each, which had been admitted to probate as a codicil; and he came to the conclusion that he was bound to regard every document admitted to probate as a testamentary document, and, so treating the list in question, it must be deemed to be a list of legatees for the amount of legacies set opposite to their respective names, and he declined to follow *Re Campshill,* 128 L.T. Jour. 548.

TRADE MARK—NAME OF ARTICLE—"GRAMOPHONE"—DISTINCTIVE WORD.

In re Gramophone Co. (1910) 2 Ch. 423. In this matter the applicants had for many years sold talking machines, which had been advertised and sold by the name of "gramophones." Although by the trade the word "gramophone" was understood to apply exclusively to talking machines made by the applicants, the word was by the public generally used as denoting any talking machine operated by a disc by whomsoever made. In these circumstances it was held by Parker, J., that the word having acquired a use as the name of all instruments of the class in question, without reference to the manufacture of the applicants, it could not be registered as a trade mark by the applicants.

WILL—SETTING APART FUND TO ANSWER LEGACIES—DISTRIBUTION OF RESIDUE OF ESTATE—RIGHT OF LEGATEE TO FOLLOW RESIDUE IN EVENT OF DEFICIENCY.

In re Evans v. *Bettell* (1910) 2 Ch. 438. This was an application under the Vendors and Purchasers Act made in the following circumstances. By the will of a testator certain annuities and legacies were given which formed a charge on the residuary estate of the testator. Under an order of the Court the executors were authorized to set apart sufficient funds to answer the annuities and legacies and to distribute the residue among the beneficiaries. A certain sum of consols was accordingly lodged in court and the rest of the estate was distributed. The residuary devisees having sold part of the residuary estate, the vendors took the objection that in the absence of any release from the annuitants and legatees or any order of the court declaring the residue, the residuary estate was still liable to be called on by the legatees and annuitants in case the sum set apart should prove insufficient, and Parker, J., upheld the objection.

RECEIVER AND MANAGER—BOND—SURETIES—DEFAULT OF RECEIVER—RIGHTS OF TRADE CREDITORS AS AGAINST ESTATE.

In re British Power Traction and Lighting Co. (1910) 2 Ch. 470. This was a debenture holders action, in which a receiver and manager had been appointed and given the usual security by bond with sureties. He incurred debts in carrying on the business of the company to the amount of £900, for which he was entitled to be indemnified out of the assets of the company. he was, however, indebted for moneys in his hands £400 which he had failed to pay. The creditors in these circumstances claimed to be entitled to be paid £900 out of the assets, contending that the loss of £400 should be made good by the receiver's sureties: but Eady, J., was of the opinion that before the receiver could claim the full indemnity of £900 he must first make good the £400; and that the creditors were in no better position, and that as the bond had not been given for their protection they had no right to enforce it as against the sureties, nor could they require the company to do so: which serves to shew that a receiver's bond may not be a very adequate protection to those interested.

PAYMENT OUT OF COURT—PAYMENT OUT UNDER ERRONEOUS ORDER—LIABILITY OF CROWN FOR ERRONEOUS PAYMENT OUT OF COURT.

In re Williams (1910) 2 Ch. 481. In this matter on incorrect, though not fraudulent, allegations and evidence, Kay, J., in 1889, made an order for payment of moneys out of court to two persons not really entitled. The payments having been duly made, the applicant who was then an infant and had since attained majority and claimed to be the person rightfully entitled, applied to discharge the order of Kay, J., and for an order for payment to her, so that she might on non-payment be in a position to claim payment out of the Consolidated Fund of the United Kingdom. Eady, J., held that the Paymaster-General having obeyed the order of court was in no default, and that in such circumstances, the Consolidated Fund could not be made liable. It would, therefore, seem that the only remedy in such a case would be against the persons who had obtained the erroneous order to compel them to refund.

VENDOR AND PURCHASER—SALE BY PLAN—CONTRACT—DISCREPANCY BETWEEN PLAN AND PARTICULARS.

Gordon-Cumming v. *Houldsworth* (1910) A.C. 537 was an appeal from the Scotch Court of Session. The estate of Dallas was offered for sale according to a plan, but in the course of negotiations, particulars were furnished of the acreage, names of tenants, etc., which included other property than that shewn on the plan. The vendor claimed that under the contract he was entitled to get all the land included in the particulars. The Lord Ordinary, who tried the action held that the plan governed. The Court of Session held that the particulars governed and the House of Lords (Lords Halsbury, Kinnear, and Shaw) agreed with the Lord Ordinary and reversed the judgment of the Court of Session.

ARBITRATION—PRACTICE—SERVICE OF NOTICE OF MOTION TO SET ASIDE AWARD OUT OF JURISDICTION—RULES, 1883, ORD. XI. R. 8a—(ONT. RULE 162).

In re Aktiebolaget v. *Societé Anonyme de Papeteries* (1910) 2 K.B. 727. In this case it was held that under the English Rules, 1883, ord. xi., r. 8a, there is no jurisdiction to allow service of a notice of motion to set aside an award on a foreign corpora-

tion out of the jurisdiction. There is no counterpart of ord. xi., r. 8a, in Ontario, but according to the definition in 3 Edw. VII. c. 8, s. 13, the word "writ" in that rule includes any document by which a matter or proceeding is commenced. The English rule expressly enables the court to authorize service out of the jurisdiction of "any summons order or notice" but in the interpretation of this rule the Divisional Court (Lord Alverstone, C.J., and Pickford and Coleridge, L.JJ.) held that the matter in respect of which the notice is to be served must come within some one or other of the grounds on which service of a writ is authorized to be made out of the jurisdiction, and it is probable that the same interpretation will be given to Ont. Rule 162.

ARBITRATION—DELIVERY OF PLEADINGS IN ARBITRATION PROCEEDINGS—POWER OF ARBITRATOR TO ALLOW AMENDMENTS.

In re Crighton and the Law, Car and General Insurance Co. (1910) 2 K.B. 738. A Divisional Court (Coleridge and Scrutton, JJ.), held that where in arbitration proceedings, an arbitrator orders the parties to deliver pleadings, he has power to authorize such pleadings to be amended.

CRIMINAL LAW—FALSE PRETENCE—EVIDENCE OF OTHER FRAUDS.

The King v. *Ellis* (1910) 2 K.B. 746. This was a prosecution for obtaining money under false pretences. The indictment alleged that he sold various articles of virtu to the complainant under an agreement that he was to charge only the cost price plus ten per cent. and that the accused represented to the complainant that the objects cost more than they actually did and thereby obtained larger sums than he was entitled to. The accused gave evidence on his own behalf and was asked in cross-examination if he had not in other transactions obtained money from the complainant for certain china figures which he alleged were old Dresden china when he knew they were not. The questions were objected to, but the objection was overruled and the examination proceeded with the object of shewing that the accused had been guilty of fraud in respect to such china. The accused having been convicted it was held on appeal by the Court of Criminal Appeal (Lord Alverstone, C.J., and Jelf, Bray, Lawrance and Coleridge, JJ.), that the evidence was irrelevant and inadmissible as being a violation of the Evidence

Act, 1898, s. 1*f*, and that the conviction must be quashed, as the jury would probably have been influenced by the improper evidence.

PHARMACY ACT, 1868 (31-32 VICT. c. 121), s. 17—(R.S.O. c. 179, s. 28)—SALE OF POISON—NAME OF VENDOR—TRADE NAME.

Edwards v. *Pharmaceutical Society* (1910) 2 K.B. 766. The appellant Edwards had been charged under the Pharmaceutical Act (31 & 32 Vict. c. 121), s. 17, (R.S.O. c. 179, s. 28) with selling poison without having placed his name on the package. It appeared that he had bought out the business of a chemist and druggist which had been previously carried on under the name of "Godfrey" and after his purchase he continued to carry on the business in that name. The poison in question had been sold by him and the package bore the name "Godfrey, Chemist," giving the address where the business was carried on. On a case stated by magistrates it was held by the Divisional Court (Lord Alverstone, C.J., and Bray and Pickford, JJ.), that the placing of the trade name of the vendor on the package was a sufficient compliance with the Act.

SALE OF GOODS—CONTRACT NOT TO BE PERFORMED WITHIN A YEAR—WRITING SIGNED BY PARTY TO BE CHARGED—STATUTE OF FRAUDS (29 CAR II. c. 3), s. 4—SALE OF GOODS ACT, 1893 (56-57) VICT. c. 71), s. 4—(R.S.O. c. 338, ss. 5, 12).

Prested Miners Co. v. *Garner* (1910) 2 K.B. 776. Notwithstanding all the decisions on the Statute of Frauds new points still occasionally arise, of which this case is an instance. The question for decision in this case being whether a contract for the sale of goods, though valid under what was formerly s. 17 of the Statute of Frauds, but is now s. 4 of the Sale of Goods Act, 1893 (R.S.O. c. 338, s. 12) may not nevertheless be bad under s. 4 of the Statute of Frauds (R.S.O. c. 338, s. 5) where it is not to be performed within a year and is not in writing signed by the party to be charged. Walton, J., found that there was no express authority on the point, but the text-writers of authority having always assumed that s. 4 applied to agreements for the sale of goods, he so held.

Correspondence

APPEALS TO PRIVY COUNCIL.

To the Editor, CANADA LAW JOURNAL:

SIR,—Referring to the editorial which appeared in your issue of the 15th November last respecting my letter which appeared in the same issue I regret very much if the letter bears the construction the opening paragraph of your editorial places upon it. I did not intend to refer in "tones of severe condemnation" to the action of the Privy Council in not accepting as credible the evidence of the defendants in the action of *Gordon* v. *Horne*, the trial judge and the Supreme Court of Canada having given credit to it. The object of the letter was to direct attention to the extent to which Privy Council intervention in our everyday litigation has of late been carried. *Gordon* v. *Horne* was only mentioned as a very recent example of it. Other instances might have been given, for example, *Blue* v. *Red Mountain Railway*, 39 S.C.R. 390 and (1909), 78 L.J.P.C. 107, where the Supreme Court of Canada by a unanimous judgment thought the justice of the case called for a new trial between the parties. The Privy Council granted leave to appeal even upon such a matter as this and ultimately reversed the decision. Or take the case of *Cumberland Railway and Coal Co.* v. *St. John Pilot Commissioners*, Canadian Reports (1910), A.C. 31, where the trial Judge, the Supreme Court of New Brunswick and the Supreme Court of Canada all agreed upon the meaning to be ascribed to certain language in a Canadian statute, yet the Privy Council granted leave to appeal and ultimately reversed the decision of all three Canadian courts. I wrote the letter referred to under a strong feeling that three appeals in litigation of this class is totally unnecessary and not in the interest of the public; that if we in Canada go to the expense of maintaining a Supreme Court at Ottawa litigation of this description if taken there ought to end there; that the expense of getting through the fourth tribunal sitting in London is equal to or greater than that of getting through all three Canadian tribunals put together; that a rich corporation or well-off individual is given a great advantage over a person of moderate means so long as the risk of being taken over to London with litigation of this character is allowed to remain. I did not mean to institute a comparison between the ability of the Canadian judiciary and that of the Judicial Committee of the

Privy Council and quite agree that comparisons are generally odious. I meant to assert that as litigation of this class calls for no great legal ability, learning or acumen, it is fallacious to assume that there is less liability to error in a judgment thereon obtained in England than in one obtained in Canada, and I meant to assert that sufficient ability is to be found on this side of the Atlantic for the satisfactory disposition of such litigation. I agree with all you say as to the great capacity and unfailing rectitude of the Privy Council. Every Canadian does that. But that is not to say that such qualities are not to be found in Canada. They are not peculiarly indigenous to the Island of Britain. As to the constitutional right to interfere with the judgments of our courts no one disputes that. England refuses to her colonies the right to settle their own lawsuits although in name they are styled "self-governing." Australia asked for the privilege and was refused and Canada cannot expect to fare better. The question is not as to the existence of the right but as to the manner of exercising it. If the Supreme Court of Canada cannot settle for us finally such questions as were involved in the cases above referred to, then it would appear to be a mere hurdle to be taken by litigants en route to the Privy Council and its usefulness to the people of Canada somewhat questionable.

I thank you for publishing my letter although you differ from my conclusions. Quot homines tot sententiæ.

Vancouver, B.C. W. S. DEACON.

[We have already expressed our views on this subject, which are not on the main issues in accord with those of our correspondent. We have not examined the other cases he refers to and cannot express any opinion as to whether they support his contentions; certainly *Gordon* v. *Horne* cannot be said to do so.—Ed. C.L.J.]

To the Editor, CANADA LAW JOURNAL:

SIR,—In Mr. Deacon's letter in your issue of 15th November last (Vol. 46, p. 692) he draws pointed attention to the fact that the solicitor and counsel for the appellants in the case of *Gordon* v. *Horne* which he refers to were persons named "Macnaghten" and that the Judicial Committee also included Lord Macnaghten. The insinuation is obvious and reminds one of the old days at Kingston, when Mr. "Archie John" Macdonell, a well-known and popular lawyer, was in partner-

ship with Mr. George Draper (a son of the late Sir William Draper) and Mr. Macdonell was occasionally asked by the County Court judge to act as a judge of a Division Court. At a court so held, Mr. Draper appeared for a litigant and was successful. The defeated litigant was afterwards asked by a friend how he accounted for his want of success, to whom he replied that his opponent "had Draper for lawyer and 'Archie John' for judge, and sure they're pardners!" Mr. Deacon accounts for his defeat in a like manner, but he is a lawyer and should not follow the example of an ignorant, uneducated layman. I would also say that should any disinterested person read the admissions of the defendant mentioned in the judgment of Clement, J., he would wonder how any judge could come to any other conclusion than that arrived at by the Privy Council and by the Court of Appeal of British Columbia.

AN OLD HAND.

PAYMENT BY CHEQUE.

To the Editor, CANADA LAW JOURNAL:

DEAR SIR,—In an editorial on "Payment by Cheque" in 38 C.L.J., p. 2, commenting on *Day* v. *McLea* (1889) 22 Q.B.D. 610, it is remarked that where a cheque payable to order and expressly stated on its face to be "in full of amount due" is received by the creditor in payment of a larger amount, there has been no decision to the effect that the creditor may apply the cheque on account and claim the balance. The general impression is that in such a case the creditor may do so, his proper course being to immediately notify the debtor to that effect.

Will you kindly let me know whether or not there has been any decision on the point since the date of the above article.

Yours very truly,

Meaford, Nov. 8. SUBSCRIBER.

[Since *Day* v. *McLea* was decided there have been two decisions bearing on the question. One of these is *Henderson* v. *Underwriters Assurance Co.*, 65 L.T. 732, from which it would appear that the payee of a cheque expressed to be "in full" could not retain the money and at the same time repudiate "the accord and satisfaction" of the debt. The other is *Mason* v. *Johnston*, 20 Ont. App. 412. As Maclennan, J.A., points out in that case, there is a difference between money paid in satisfaction of a debt and money paid in respect of a tort.—ED. C.L.J.]

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Exchequer Court.] [November 2, 1910.

THE KING *v.* ST. CATHARINES HYDRAULIC CO.

Lease—Covenant for renewal—Construction.

A lease for 21 years of mill-races and lands on the old Welland Canal contained the following covenant: "After the end of 21 years, as aforesaid, if the said (lessors) do not continue the lease of the said water and works" they would compensate the lessees for their improvements.

Held, GIROUARD and DUFF, JJ., dissenting, that at the end of the 21 years the lessees were entitled to a renewal of the term but not to a new lease containing a similar covenant for compensation. They had a right to renewal or compensation but not to both.

After the original term expired the lessees remained in possession paying the same rental as before, for a further term of 21 years, no formal lease therefor having been executed and none demanded or tendered for execution. After the expiration of this second term they were dispossessed and claimed compensation for improvements by petition of right.

Held, DAVIES and ANGLIN, JJ., dubitante, that the original term of 21 years was continued, or renewed, for a further like term.

Held, per IDINGTON, J., GIROUARD and DUFF, JJ., contra, that the lessees having obtained a renewal their right to compensation was gone.

Per DAVIES and ANGLIN, JJ.:—The lease was probably not renewed within the meaning of the lessor's covenant, and as there was no proof of a demand for renewal the lessees, having remained in possession for the entire period for which they could have claimed a renewal, can have no right to compensation for improvements. If they ever had such a right in default of obtaining a renewal it is barred by the Statute of Limitations.

Per IDINGTON, J.:—The Statute of Limitations would be a

bar to the lessees obtaining compensation for improvements made during the original term.

Appeal allowed with costs.

Dewart, K.C., for appellant. *Mowat,* K.C., for respondents.

NOTE.—The reporter desires to substitute the above for the note appearing ante vol. 46, p. 738.—Ed. C.L.J.

Province of Ontario.

COURT OF APPEAL.

Full Court.] [Dec. 5, 1910.

REX v. HUGHES.

Criminal law—Carnal knowledge of girl under 14—Second count for offence when girl over 14—Trial on both counts together—Withdrawal from jury of the second count—Conviction on first count.

Motion for leave to appeal from a conviction by the Judge of the County Court of York.

The defendant was indicted for two offences, set out in separate counts, viz., (1) for having carnal knowledge in 1907 of a girl then under fourteen, and (2) for illicit connection in 1909 with the same girl—being a girl of previously chaste character—and then over fourteen, but under sixteen. The defendant was tried upon the two counts together, no application being made for a separate trial. But the trial Judge, after all the evidence had been taken, withdrew the second count from the consideration of the jury; and they found the defendant "guilty" upon the first count. The defendant suggested certain questions which might form the subject of a stated case, viz.: (1) whether it was proper to include the two charges in one indictment, and whether it was proper after all the evidence had been taken, to submit the first charge to the jury; (2) whether it was proper to exhibit the child of the prosecutrix to the jury as evidence against the defendant; (3) whether it was proper for the jury to hear evidence of criminal intimacy subsequent to 1907; (4) whether there was any evidence of carnal knowledge apart from what occurred after 1907, the prosecutrix's evidence

being self-contradictory and uncorroborated; (5) whether there should be a new trial.

Held, 1. It was within the power of the court to try both counts together, there being no objection made, nor any application for separate trial.

2. The fact that the trial judge withdrew from the jury the second count does not affect the question.

3. It has been the practice to permit the production of the child at the trial and the pointing out to the jury the likeness in the child to the defendant; and there is nothing objectionable to the principle of such evidence being given, but it ought to be within the power of the court to prevent any abuses of the practice.

Robinette, K.C., and *Plaxton,* for defendant. *Bailey,* K.C., for the Crown.

HIGH COURT OF JUSTICE.

Divisional Court—Chy.] [Dec. 14, 1910.

RE ROWLAND AND MCCALLUM.

Statute—Construction—"Shall" and "may"—Imperative or directory—Drainage Act.

Appeal from an order of MEREDITH, C.J.C.P. The main question involved was the construction of sec. 48 of 10 Edw. VII. c. 90.

The language of the statute to be considered was as follows:—"At the court so holden the judge shall hear the appeal and may adjourn the hearing from time to time, but shall deliver judgment not later than thirty days after the hearing."

BOYD, C.:—The judge is here directed thus: he shall hear, he may adjourn, but shall deliver judgment not later than thirty days from the hearing. The effect of the words "shall" and "may" is here emphasized, and it is rather a misfortune than otherwise to see a disposition to read them as interchangeable and convertible. The force of the Interpretation Act was upheld by Armour, C.J.O., in *In re Township of Nottawasaga and County of Simcoe,* 4 O.L.R. at p. 11, and it appears to me to be a wholesome rule to bring about some certainty in the present flux of judicial opinion. The trend of legislation in this and kindred provisions for drainage suggests to my mind that the

time-limits prescribed are meant to be observed, and that summary and prompt and well-defined periods are given within which to bring to a practical close these disputes of merely local importance.

The burden is on the party who asserts that "shall" is to be read as permissive, and not as peremptory; and the text of this section and its history fortify that position. No reasons appear for any relaxation of the time-limit, on the facts of this case.

The method of decision in *In re Township of Nottawasaga and County of Simcoe* has been followed in the Supreme Court of Canada in *In re Trecothic Marsh*, 37 S.C.R. 79.

Appeal allowed, no costs.

H. S. White, for appellants. *Proudfoot*, K.C., for Rowland.

Province of Nova Scotia.

SUPREME COURT.

Drysdale, J., Trial.] [Nov. 20, 1910.

CORBETT *v.* PIPES.

Cumberland Sewers Act—Acts of 1893, *c.* 80—*The Marsh Act, R.S.N.S.* (1900) *c.* 66—*Construction of dykes and aboiteaux —Prescription—Lost grant.*

Sec. 3 of the Cumberland Sewers Act (being practically the Marsh Act as applied to the county of Cumberland) provides that "a majority in interest of the proprietors of any marsh. swamp or meadow lands within the jurisdiction of commissioners may by themselves or their agents select one or more commissioners to carry on any work for reclaiming such lands—and the choice or dismissal of any commissioner for or from the management of any particular land shall be made in writing under the hands of a majority of the proprietors in interest in such lands."

Held, 1. The owners of any tract of marsh land though such tract may comprise lands already in charge of a commissioner may organize under the above section for the purpose of carrying on a necessary work such as the building of an aboiteau.

2. The words "for reclaiming such lands" must be read not only to include the original reclamation of dyke lands but the upkeep of necessary works to protect them from the sea.

3. The Act permitted assessment for interest and also the employment of an overseer who was not a proprietor.

4. While the aboiteau in question was kept up as far back as evidence could be given by the proprietors of four certain bodies of marsh yet as it appeared that the contributions thereto were made under the provisions of the Marsh Act, the court would not in such case presume a lost agreement for contribution or base a right to recover on the theory of prescription. *Roach* v. *Ripley*, 34 N.S.R. 352, distinguished.

Rogers, K.C., for plaintiff. *Roscoe*, K.C., and *Ralston*, for defendant.

Full Court.] [Nov. 26, 1910.

THE KING *v.* NEILSON.

Industrial Disputes Investigation Act, 1907—*Offence against—Aiding strikers—Word "employee"—Evidence on laying information—Code ss.* 655, 710.

A dispute arose between the Inverness Railway and Coal Company in relation to a deduction made from the wages of certain men employed by the company in their mines as a result of which some three hundred of the company's employees went out on strike. During the pendency of the strike defendant representing an organization known as the United Mine Workers of America gave cheques to merchants for goods supplied on his order to men who were out on strike.

Held, 1. This was an inciting, encouraging or aiding the persons so assisted to go or continue on strike, within the Industrial Disputes Investigation Act, (1907) Dom. c. 20, s. 60 and that defendant was properly convicted.

2. An employee of a company who without having been dismissed goes out on strike and who is at liberty to return to his employment is still an employee of the company within the meaning of the Act.

3. Sec. 655 of the Code as amended by Acts (Dom.) of 1909, c. 9 with respect to the taking of evidence when an information is laid only applies to indictable offences. Code s. 710.

Mellish, K.C., for prosecutor. *W. B. A. Ritchie*, K.C., for defendant.

Full Court.] [Nov. 26, 1910.

THE KING *v.* ATKINSON.

Intoxicating liquors—Previous conviction—Evidence of—Same name and residence.

Defendant was convicted before a stipendiary magistrate of a second offence against the Liquor License Act, the only evidence of the previous conviction being the production of a certificate under the Act from which it appeared that a person of the same name and address as defendant had been previously convicted before the same magistrate.

Held, affirming the conviction, that the evidence was sufficient.

F. McDonald, in support of appeal. *O'Connor,* K.C., contra.

Full Court.] [Nov. 26, 1910.

THE KING *v.* BYNG.

Intoxicating liquors—Club—Colourable transaction to evade Act.

Defendant was tried and convicted on a charge of keeping intoxicating liquors for sale contrary to the provisions of the Liquor License Act. The defence relied on was that the premises upon which liquors were admitted to have been kept were the property of a duly incorporated and organized social club, but the evidence shewed that no bona fide club was ever organized and that the alleged transfer of the business previously carried on there by defendant was merely a colourable transaction having for its purpose the evasion of the provisions of the Act.

Held, that defendant was rightly convicted and that his appeal must be dismissed.

O'Connor, K.C., for appeal. *F. McDonald,* contra.

Full Court.] [Nov. 26, 1910.

BENTLEY *v.* MORRISON.

Statute of Frauds—Bill of sale—Agreement not to register—Promissory note—Continuing security—Judgment—Collateral attack.

L. H. B. becoming insolvent made an assignment of his goods and stock in trade to F. by whom they were sold at public auction. At the sale, the goods were bought in for A. M. B. the wife of L. H. B., who having obtained her husband's

consent to her doing business in her own name, on March 31st, 1904, registered a declaration under the Act of her intention to carry on business under the name and style of B. & Co. and gave a power of attorney to L. H. B. to act as manager of such business. In March, 1907, at a time when the firm of B. & Co. was in difficulties and unable to meet its liabilities, L. H. B. executed a bill of sale in his own name to defendant M. to secure the sum of $1,700 and at the same time delivered to him a promissory note for the same amount payable on demand. By agreement between the parties the bill of sale was not filed but was retained in the possession of M.'s solicitor until June, 1909, when M. purporting to act under the bill of sale sold the goods of B. & Co. to C. for the sum of $1,700, taking in part payment the note of C. made to B. & Co. and indorsed by B. & Co. to him. On the following day he brought action on the promissory note and recovered judgment for the amount of the note with interest and costs, and issued execution. In the interim between the date of the giving of the bill of sale and note B. & Co. had made payments on account and had been supplied with other goods by defendant.

In an action by plaintiff and other creditors to set aside the bill of sale and for an accounting and other relief,

Held, 1. The agreement between defendant and L. H. B. under which the bill of sale was not to be recorded rendered the transfer void as against creditors.

2. The promissory note given to defendant contemporaneously with the bill of sale was a continuing security upon which defendant was entitled to recover except in so far as the indebtedness had been reduced by payments, the amount to be determined by the assignee.

3. The judgment recovered by defendant in his action on the note could not be attacked collaterally or in the present proceedings.

Mellish, K.C., for appeal. *Rogers,* K.C., and *McLatchy,* contra.

Full Court.] [Nov. 26, 1910.

GORTON-PEW FISHERIES CO. *v.* NORTH SYDNEY MARINE RY. CO.

Negligence—Marine railway—Contract for hauling—Liability for proved acts of negligence—Negligence inferred from facts proved.

Defendant company took charge of plaintiff's vessel for the

purpose of hauling it out on defendant's marine railway and making repairs. While the work of hauling out was proceeding the vessel fell over and was injured. In an action claiming damages defendants relied upon a written contract containing the following provision: "The company give distinct notice to all parties intending to use or using the railway and it shall be held to be part of their contract with such parties that the company will not be liable for any injury or damage by accident—which vessels or their cargo or machinery may sustain on the railway or whilst being moved there or being launched therefrom."

Held, 1. Such provision did not in any way limit the responsibility of the company for acts of well established negligence.

2. It was not necessary to plaintiffs' right to recover that some specific act of negligence on their part should be established but that such negligence might be inferred from the facts proved.

W. B. A. Ritchie, K.C., and *Robertson*, for appeal. *Mellish*, K.C., contra.

Full Court.] [Nov. 26, 1910.

McCALLUM *v.* WILLIAMS.

Principal and agent—Sale of land—Commission—Consideration—Written agreement—Construction—Oral evidence offered to shew intent.

Defendant placed his farm in the hands of plaintiff, a real estate agent, for sale at a fixed price, under an agreement in writing whereby in consideration of plaintiff registering the farm in his real estate register (a publication issued by plaintiff), defendant agreed to pay him a commission of three per cent. of the price obtained "whenever a sale of the property or any part thereof takes place." . . . "Such commission to be paid whether the said real estate . . . is sold either at the price mentioned above or at such other price that I may hereafter accept." There was no evidence that plaintiff, apart from including the property in the publication mentioned, did anything towards effecting a sale, and, as a matter of fact, the property was sold by defendant about a year after without the interposition of plaintiff.

Held, nevertheless, reversing the judgment of the County Court judge for District No. 4, that plaintiff was entitled

under the terms of the agreement to recover commission at the rate stipulated on the selling price of the farm.

DRYSDALE and LONGLEY, JJ., dissented and RUSSELL, J. who concurred, did so with doubt.

Held, that oral evidence offered for the purpose of shewing the meaning attached to the agreement by one of the parties thereto was properly rejected.

O'Connor, K.C., for appeal. *Milner,* contra.

Graham, E.J., Trial.] [Dec. 2, 1910.

HUNT *v.* DARTMOUTH FERRY COMMISSION.

Navigable waters—Public harbour—Grant of water lot—Wharf erected upon—Whether an interference with navigation—Injury to wharf by steamer—Liability for—Excessive speed during fog.

A grant of a water-lot on the shore of a harbor is subject impliedly to the public right of navigation.

Whether a wharf erected by the grantee upon such water-lot is an interference with the right of navigation or not is a question of fact to be determined by the circumstances of each particular case.

A wharf so erected cannot be run into or injured by a vessel navigating the waters of the harbour if by the exercise of ordinary care such injury can be avoided.

Plaintiff was the owner, under a grant from the Crown, made many years ago, of a water-lot on the shores of Halifax harbour upon which lot a wharf was erected which was found, as a fact, not to be a nuisance but a convenience to the public, and to vessels arriving at the port with cargoes of produce for the Halifax market. Defendants were the owners of a number of ferry steamers plying between a ferry landing near plaintiff's wharf on the Halifax side of the harbour and the landing on the opposite side. One of the defendants' steamers, in crossing the harbour during a fog, ran into plaintiff's wharf and injured it. The evidence shewed that the fog at the time was so thick that the mate of defendant's boat only saw plaintiff's wharf when it was twenty feet away, too late to avoid a collision, and that although the usual running time of the boat from landing to landing was from nine to ten minutes and the boat on this occasion was stopped in the middle of the harbour to allow an incoming steamer to pass, the time occupied in crossing was between ten and eleven minutes.

Held, that the speed at which the steamer was run, under the circumstances prevailing at the time, was excessive and that defendants were liable in damages for the injuries resulting from the collision.

W. B. A. Ritchie, K.C., and *Robertson,* for plaintiff. *J. J. Ritchie,* K.C., for defendant.

Full Court.] D'HART *v.* MCDERMAID. [Dec. 3, 1910.

Vendor and purchaser—Amount payable by instalments—Interest—Construction of word "due."

An agreement in writing for the sale by defendant to plaintiff of a house and lot of land for the agreed price of $800, payable in instalments, after providing for payment by plaintiff of the instalments at stipulated times and taxes, insurance and repairs, etc., provided: "The rate of interest chargeable by all parties concerned on the balance of this purchase price which may from time to time be due shall be, etc." It appeared that at the time of the transaction defendant was in insolvent circumstances and that the property was incumbered and that the price fixed, to be paid by plaintiff, was sufficient to discharge all incumbrances and to leave a small balance over to be paid as commission to the person named as defendant's agent to receive the money. Defendant admitted that he was handing the property over to the plaintiff for the incumbrances against it and that he was to receive nothing beyond that.

Held, reversing the judgment of the trial judge (RUSSELL, J. dissenting), that the interest clause of the agreement must be read as applying only to the instalments, *i.e.,* to instalments from time to time due and unpaid, and not to the principal sum named as the purchase price of the property.

F. McDonald, in support of appeal. *W. B. A. Ritchie,* K.C., contra.

Full Court.] [Dec. 3, 1910.

OLAND *v.* MACKINTOSH.

Partition—Sale by order of court—Sheriff's deed—Effect of—Easement—Right to continue drain—Heir buying will not acquire against third party in absence of reservation.

Held, where land was sold by the sheriff by order of the court made in a partition suit and two of three lots of land were

purchased by plaintiff, one of the heirs at law and the third lot by defendant. *Held*, by the majority of the court that the conveyance by the sheriff has the same effect as a conveyance by one of the heirs and the fact of the sale being a judicial one, made under the order of the court, made no difference in the relations between the heirs, and that plaintiff purchasing, in the absence of an express reservation to that effect, would not acquire the right to continue a drain established by the common owner and passing through the lot purchased at the same sale by defendant.

Per RUSSELL and DRYSDALE, JJ., dissenting:—The principle that the grantor has no right to derogate from his own deed has no application to a judicial sale under order of the court. The deeds to the parties purchasing at such sale must be treated as simultaneous deeds from the court to such purchasers and plaintiff as purchaser of lots one and two would acquire as a quasi easement the right to drain through lot three, necessary to the reasonable enjoyment of her property.

Mellish, K.C., and *Macilreith*, for appeal. *J. M. Davison*, contra.

Full Court.] [Dec. 3, 1910.

CUMBERLAND COAL AND RY. CO. *v.* MCDOUGALL.

Criminal Code s. 501—Acts of intimidation by striking employees of company—Restraining order pending trial—Discretion of judge granting—Balance of convenience—Association or class—Suing representatives of.

A restraining order, based upon alleged violations of the Criminal Code s. 501, was granted to a judge of the Supreme Court restraining defendants, pending the trial of the action, from the commission of certain acts of intimidation alleged to have been committed by them for the purpose of preventing the company from carrying on operations in connection with its coal mines by hiring other men to take the places of those of its employees who had gone out on strike. The evidence shewed concerted action on the part of the strikers with a view to preventing the company from working its mines until the demands of the strikers were complied with.

Held, 1. Where the judge, in the exercise of his discretion, after considering the affidavits before him, thought the case a proper one for a restraining order a strong case must be made out to induce the court to interfere.

2. In such a case the balance of convenience must be considered, and in this case the balance of convenience was in favour of continuing the restraining order.

Semble. There is no rule or authority to the effect that as a pre-requisite to suing an association or class of individuals in the name of some of them an order of the court or a judge must be obtained authorizing this to be done.

O'Connor, K.C., for appeal. *Mellish,* K.C., and *J. J. Ritchie,* K.C., contra.

Full Court.] [Dec. 3, 1910.

SAM CHAK *v.* CAMPBELL.

False arrest—Action for—Damages—Evidence in mitigation—Receivable in absence of plea—Jury—Verdict of —Reasonableness of.

On the trial of an action by plaintiff claiming damages for false arrest, for loss of time during his detention in jail and for solicitors' fees paid in connection with procuring his discharge, plaintiff failed to appear on the trial to prove the damages claimed but his solicitor stated that the expenses incurred in connection with the discharge were something like $50. Evidence was given in mitigation of damages to shew that plaintiff's arrest and detention were due to an effort on his part to evade the provisions of the Chinese Immigration Act, R.S.C. c. 95, s. 7, in that he being a person of Chinese origin attempted to enter Canada without payment of the tax required in such cases.

Held, that such evidence was receivable without a plea in mitigation of damages and that it was proper evidence for the consideration of the jury in fixing the damages, if any, to which plaintiff was entitled and that they were not subject to limitation or control as to the degree of effect that would give to it.

The jury having awarded plaintiff one dollar damages,

Held, that it could not be said under the circumstances that this was not a conclusion at which reasonable men could arrive.

MEAGHER and RUSSELL, JJ., dissented, holding that the detention before plaintiff was brought to trial was unreasonable and that he was entitled to recover damages for such detention with costs of action and trial.

O'Connor, K.C., and *F. Macdonald,* for appeal. *Macilreith,* contra.

Graham, E.J.] [Dec. 7, 1910.

DENNIS *v.* CITY OF HALIFAX.

Municipal corporation—Supply of water for domestic purposes—Instalment of water meters—Regulations affecting—Words "service pipe"—Interference with city officials—Remedy.

The Halifax City Charter authorizes the city engineer to cause a water meter to be placed on any service pipe supplying water to any premises in the city, and by other sections provisions are made giving city officials license to enter any such premises at reasonable times and to remain thereon for such reasonable length of time as may be required for the purpose of fixing, examining or reading the meter, etc.

Held, 1. That in determining the meaning to be given to the legislation the provisions of the charter must be read as a whole.

2. The words "service pipe" apply to the pipe leading from the main pipe in the street extended to and inside the wall of the house, whether the house is on the line of the street or back from it and that such pipe must go a reasonable distance inside the wall of the house, for the purpose of connection and use.

3. It appearing from the evidence that the meter placed in defendant's premises recorded accurately the quantity of water used and was reasonably close to the wall, and was removed by defendant and that defendant refused to permit the city official sent there for that purpose to replace it, this refusal was a sufficient interference to justify the engineer in proceeding in the event of a continued refusal to turn the water off from the premises.

Allison, for plaintiff. *Bell*, K.C., for defendant.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] [Nov. 28, 1910.

STEWART *v.* TESKEE.

Joint tort feasors—Liability for damages not necessarily the same in amount for all.

Since the fusion of common law and equity the damages assessed against a number of joint tort feasors need not always

be the same for all; but, if one of them is responsible for only a part of the total wrong done and the liability, though joint as to all at the time of the commencement of the action, arose at different dates, there, may under Rules 219 and 220 of the King's Bench Act, R.S.M. 1902, c. 40, be a verdict against the one for that part and against the rest for the total amount of damage committed.

O'Keefe v. *Walsh* (1903), 2 K.B. 681; Mayne on Damages, 673, and *Copeland Chatterson Co.* v. *Business Systems Ltd.*, 11 O.R. 292, followed.

The defendant Teskee tortiously cut down and carried away a large number of trees from the plaintiff's land with the assistance of his co-defendants hired by him. The work occupied eight days, but the defendant K. was only engaged for two days upon it.

Held, that K. was not liable for anything beyond the amount of the damage done during the two days.

The plaintiff had failed to shew what that amount was; but, as K. had joined with the others in paying $91 into court to answer the plaintiff's claim, thus admitting his liability for that amount, the verdict of $1,000 against all in the trial court was changed to one for $91 against K. and for the balance, $909, against the other defendants.

Fullerton and *Jacobs*, for plaintiff. *Hoskin*, K.C., for defendants.

Full Court.] [Nov. 28, 1910.

CITY OF WINNIPEG *v.* WINNIPEG ELECTRIC RY. CO.

Injunction—Forfeiture—Waiver—Estoppel—Meaning of words "operation, conduct and management."

Appeal from judgment of Mathers, J., noted ante., vol. 46, p. 116. This judgment as there noted was affirmed with the following variations.

Held, per HOWELL, C.J.A., and PERDUE, J.A., (RICHARDS, J. A., dissenting), that there was nothing in the agreement referred to in par. 1 of that note or in the company's Act of incorporation to prevent the company from using the direct electric current developed in the city as described in par. 3 to operate its street cars without the further consent of the city and erecting poles and wires for that purpose.

Held, also, unanimously, that the defendants had not acquired the corporate powers of the Manitoba Electric and

Gas Light Co., or the North West Electric Company under deeds transferring all their property, rights and franchises to the defendant company, for those companies had no right under their charters to alienate their corporate powers, and consequently, the defendants had no right to erect or maintain poles or wires in the city for purposes of electric lighting, heating or power unless authorized to do so by by-law of the city, although the companies named which were now defunct, had formerly acquired and exercised such rights.

Wilson, K.C., *Robson*, K.C., and *Hunt*, for plaintiffs. *Munson*, K.C., and *Laird*, for defendants.

KING'S BENCH.

Mathers, C.J.] [Oct. 18, 1910.

RE FEDORENKO.

Extradition—Political crime.

The accused was a member of the social democratic party in Russia, whose object was not only to alter the form of government, but also to do away with private ownership of property. A propaganda was carried on by them throughout the country and many revolutionary outrages had been committed by them. The crime of which the accused was charged was the killing of a constable, in a district where martial law had been proclaimed and was in force, under the following circumstances: The accused and a companion, strangers to the locality, were staying at the house of a resident, when the village constable and a number of watchmen, hearing of their visit, decided to take them to the administrative office to give an account of themselves. When they got outside of the house the accused shot and killed one of the watchmen and he and his companion, being pursued, fired several more shots at their pursuers but escaped. They had not been accused of any offence and were not taken for any.

Held, that this crime, even although called in Russia, under the circumstances, a political crime, was not a crime of a political character within the meaning of the treaty between Great Britain and Russia as it was not one committed in furtherance of any political object, and that the prisoner should be remanded for extradition. *Re Castioni* (1891), 1 Q.B. 156, followed.

Howell and *A. V. Hudson*, for Emperor of Russia. *Hagel*, K.C., and *Finklestein*, for prisoner.

Macdonald, J.] [Nov. 16, 1910.

PHILLIPS *v.* SUTHERLAND.

Infant—Repudiation of contract made by—Repayment of money received under voidable contract—Nonsuit, effect of.

An infant who has made a sale of real property, and afterwards during infancy repudiated the contract, may, after attaining majority, maintain an action to cancel the contract, although such action is not brought immediately, provided that he has done nothing since attaining full age to avoid the previous avoidance; but in order to succeed in the action he should return any money received from the purchaser.

If, in such a case, the money is not paid back or offered, the plaintiff should be nonsuited, with a direction, however, that the nonsuit should not have the same effect as a verdict on the merits for the defendant.

Robson, K.C., and *Laidlaw*, for plaintiff. *Wilson*, K.C., and *Hamilton*, for defendant.

Robson, J.] [Nov. 24, 1910.

HART *v.* DUBRULE ET AL.

Attachment of debts—Garnishment—Action for unliquidated damages.

The right to proceed under Rule 759 of the King's Bench Act for the attachment of debts before judgment is confined to cases in which the amount of the plaintiff's claim can be definitely ascertained at the time the action is brought and the rule does not apply when the claim is for unliquidated damages whether arising from tort or breach of contract.

Where, therefore, the plaintiff's claim was obviously partly made up of unascertained damages and neither the statement of claim nor the affidavit contained any definite allegation of a certain amount having been earned by plaintiff at the time the action was brought, an order attaching debts before judgment was set aside with costs.

McIntyre v. *Gibson*, 17 M.R. 423, followed.

Heap, for plaintiff. *Galt*, K.C., for defendant.

Macdonald, J.] [Nov. 28, 1910.

PEDLAR *v.* CANADIAN NORTHERN RY. CO.

Railway company—Liability for accident at level crossing—Sounding whistle and ringing bell of engine—Negligence—Contributory negligence.

Two of the plaintiff's teams driven by his servants were approaching the level crossing of the highway with defendant's railway. The drivers were on the lookout for trains but saw and heard nothing and proceeded to drive across the track when a train struck and killed one of the teams and damaged the waggon and harness.

The engineer and fireman both swore that the whistle had been sounded as required by section 274 of the Railway Act, R.S.C. 1906, c. 37, but they did not claim that the bell had been rung as that section also required.

The defendants also contended that the drivers should have seen the headlight of the engine and therefore were guilty of contributory negligence, but there was some evidence that the headlight might have been obscured at the moment by escaping steam.

Held, that the plaintiff was entitled to a verdict for the amount of his loss.

Fullerton and *Foley,* for plaintiff. *Clarke,* K.C., for defendants.

Book Reviews.

A Treatise of the De Facto Doctrine in its relation to public officers and public corporations, based upon the English, American and Canadian cases; including comments upon extraordinary legal remedies in reference to the trial of title to office and corporate existence. By ALBERT CONSTANTINEAU, B.A., D.C.L., County Judge of Prescott and Russell, Ontario. Toronto: The Canada Law Book Company. Rochester, N.Y.: The Lawyers Co-Operative Publishing Company. 1910.

The author enters boldly into a new field of legal text-writing, and has by this work established for himself a high position as an author. This being the first book on the subject he has been without any help in the arrangement of the great mass of matter before him for consideration.

As some of our readers may not be familiar with the subject, it may not be amiss to shortly refer to his definition of the De Facto Doctrine. He speaks of it as a rule of law which, (1) justifies the recognition of the authority of goverments established and maintained by persons who have usurped sovereign authority and assert themselves by force and arms against the lawful government; (2) which recognizes the existence of, and protects from collateral attack public or private bodies corporate, which though irregularly or illegally organized, yet, under colour of law, openly exercise the powers of regularly created bodies; (3) which imparts validity to the official acts of persons who under colour of right hold office under such governments or exercise existing offices where the performance of such official acts is for the benefit of the public and not for their own personal advantage; the doctrine being grounded on considerations of public policy, justice and necessity. It will readily be seen how wide a field is thus necessarily covered.

A careful examination has been made of the Canadian and English cases on the subject and they are all cited and discussed. The volume will therefore (apart from the citation of American authorities) be most useful both in England and her colonies. It must also, for this as well as other reasons, be most acceptable to the profession in the United States, for in that country is to be found, what cannot be found in the mother country and her dependencies, an unbroken current of authorities which traces the evolution of the governing principles from its first application to the settled doctrine of the present day.

The aim of the author has been, in setting forth the general principles of this somewhat neglected doctrine, as gathered from English, Canadian and American reports and in stating his propositions in accordance with his views of what each case decides, to illustrate them by interweaving verbatim quotations from the more important judicial utterances. This has several advantages and lends additional value to the work, especially as very many of the volumes consulted are not available to most practitioners.

Whilst the author has of necessity gathered largely from United States reports, the book is by no means what is generally called an American text-book. It evidently was not written for any particular jurisdiction, but for all communities whose systems of jurisprudence are based on the English common law. It must also be remembered that there is no English work

which more than hints at the great principles discussed in the book before us. The consequence is that the doctrine has largely been overlooked in many cases where its application would have been an easy means of settling difficult points of law.

The great labour of selecting the leading cases on the subject from the multitude of authorities in the various courts of the United States, can only be understood by those who have had occasion, in this or other matters, to search for light in that country's wilderness of authority.

In the latter part of the work are discussed matters which are of special interest in this country, such as habeas corpus, certiorari, mandamus, injunction and quo warranto; special care being given to the chapter on the latter subject. This will be found very valuable to Canadian practitioners. As a matter of detail we notice an excellent and exhaustive index with the date of every case cited.

Bench and Bar.

We notice that Mr. Frank Ford, K.C., of Regina, formerly Deputy Attorney-General of Saskatchewan, has entered into partnership with Messrs. Emery, Newell and Bolton of Edmonton, Alberta. We congratulate this firm in having secured the services of Mr. Ford. He was most favourably known to the profession in Ontario before he went to the west, and there he admirably filled the duties of his office. We wish him all success.

COUNTY OF HASTINGS LAW ASSOCIATION.

The members of the Bar of the county of Hastings have a full appreciation of the benefits of the old-fashioned social gathering of the profession. Their annual dinner was held on December 5th when a very pleasant evening was spent and some excellent speeches made. The principal guest was Sir Glenholme Falconbridge, Chief Justice of the King's Bench Division.

Canada Law Journal.

VOL. XLVII. TORONTO, FEBRUARY 1. Nos. 2 & 3.

WIFE'S RIGHT TO INDEPENDENT ADVICE.

COX V. ADAMS—STUART V. BANK OF MONTREAL.

We have already called the attention of our readers more than once to the case of *Stuart* v. *Bank of Montreal* which, after same changes of fortune, has been finally decided in favour of the plaintiff by the court of last resort. It will be remembered that the majority of the judges of the Supreme Court reversed the finding of the trial judge in favour of the bank, on the ground that the case fell within the principle of the decision in *Cox* v. *Adams*, 35 S.C.R. 393, which they were bound to follow. The bank appealed to the Privy Council, and the appeal was argued in April last before the following members of the Judicial Committee: Lord Macnaghten, Lord Collins, Lord Shaw, and Sir Arthur Wilson. It was a battle of the giants, so far as the counsel appearing for the parties were concerned, the leader for the bank being Sir Robert Finlay, whose name will be long remembered by all loyal Canadians for his masterly presentation of their case in the Fisheries Arbitration, while the brunt of the contest on behalf of the respondent fell on the stalwart shoulders of Danckwerts, K.C., formerly of Cape Colony, but now one of the foremost gladiators in the wider arena of the English Bar.

The judgment was delivered by Lord Macnaghten, and when one has admired the crisp and clear-cut sentences in which that past-master, alike of the science of law and of the art of judicial exposition, has stated his reasons, what strikes one most forcibly is the cool, almost cavalier way in which their Lordships of the Privy Council brush aside the much canvassed decision of our Supreme Court in *Cox* v. *Adams*, the famous case which "added new terrors to the conduct of banking business." This case it

has been said was the fons et origo of the *Stuart* case, the difficulties of which seem to have resulted from a failure to distinguish between what was really *held* from what was merely *obiter*. The disturbing findings in *Cox* v. *Adams* have now happily been relegated by a tribunal from which there is no appeal—the vast and dreary limbo of overruled cases.

On this point we quote Lord Macnaghten, who says that *Cox* v. *Adams* "decided, or was supposed to have decided, that no transaction between husband and wife for the benefit of the husband can be upheld unless the wife is shewn to have had independent advice," and proceeds to say that, "Their Lordships do not think that the doctrine supposed to be laid down in *Cox* v. *Adams* can be supported, and in fact no attempt to support it was made by the learned counsel at the Bar who appeared for Mrs. Stuart."

Another quotation from the judgment is worthy of consideration in this connection: "Their Lordships are of opinion that the order of the Supreme Court of Canada is right, though they are unable to concur in the reasons on which that order is founded."

It appears, then, that in the opinion of their Lordships of the Privy Council, the Judges of the Supreme Court of Canada while right in their judgment are wrong in their reasons. It becomes, therefore, a matter of some importance to the Canadian lawyer to know the grounds on which the final judgment is based, and to what extent they modify or illustrate the existing law. It seems to us that, so far as at present appears, the court of final resort has simply found, as a jury might do, that a certain state of facts existed, and applied to these facts principles of law which have for a long course of years been well known and fully recognized. If this view be correct it would seem that this cause célèbre turns out in the last resort to be one of the innumerable multitude of cases, feared of appellants but by reporters blessed, which turn upon questions of fact and should never have got into the reports at all. This statement may possibly surprise some of our readers, but it can we think be supported by another

quotation or two from the judgment. First of all, we may refer to a synopsis of the facts, as they appeared, to Lord Macnaghten: "The action which has given rise to this appeal was brought by Mrs. Stuart, a married lady living with her husband the respondent John Stuart, against the Bank of Montreal with the object of setting aside a series of transactions in connection with a pulp and paper company known as the Maritime Sulphite Fibre Company, Limited, in which the wife became involved at the instance of her husband for his accommodation and for the accommodation and benefit of his associates. The company and its shareholders, who were only five in number, were at the time under heavy liabilities to the bank. Mr. Stuart himself had no available means. Everything he had was embarked or sunk in the company. The transactions in question began by Mr. Stuart, who was impecunious and strangely sanguine, offering his wife as security to the bank for some further advances which his associates, more solvent and less hopeful, were unwilling to guarantee. They ended in the transfer to the bank of everything Mrs. Stuart possessed, so that in 1904 she was, as the bank was informed by its solicitor, 'absolutely cleaned out.'"

The judgment goes on to say that: "The evidence is clear that in all these transactions Mrs. Stuart, who was a confirmed invalid, acted in passive obedience to her husband's directions. She had no will of her own. Nor had she any means of forming an independent judgment even if she had designed to do so."

It is, however, stated in the judgment, and it is sufficiently plain from all the facts and circumstances of the case, that Mrs. Stuart ("a lady of intelligence and refinement," as described by Mr. Justice Mabee, the trial judge) repudiated in the most express terms any notion of undue influence, pressure or misrepresentation and said that she had acted of her own free will, to relieve her husband in his distress, and "would have scorned to consult any one" in such emergency. But, in their Lordships' view these decisions merely shew how deep-rooted and how lasting the influence of her husband was. They proceed to

say that, however difficult it may be to determine the point at which influence amounts to undue influence, in the case at their bar "there is evidence of overpowering influence, and the transaction brought about is immoderate and irrational." They hold accordingly that "in this case there is enough, according to the recognized doctrine of courts of equity to entitle Mrs. Stuart to relief."

There is one feature in this case which seems to call for comment owing to the prominence given to it in the judgment. We refer to the strongly expressed view taken by the Judicial Committee as to the position of the gentleman who acted as solicitor for the bank throughout the whole course of the transactions which have been successfully impeached, and who was also Mr. Stuart's solicitor during the earlier part of the transactions. He is a man of unblemished honour and integrity and of the highest standing at the Bar and in the province, yet it is stated in the judgment that unfair advantage was taken of the plaintiff's confidence in her husband, not only by the husband, but also by the solicitor who acted for him to a certain extent as well as for the bank. The judgment of their Lordships states that they "do not attribute intentional unfairness" to the solicitor, but that being himself interested in the transaction and acting for the husband and the bank he "was in a position in which it would have been almost impossible for any man to act fairly."

When reading these and other severe comments of their Lordships on the conduct of Mr. Stuart and his legal adviser, it is well to remember that, as already suggested, these comments are practically the findings of four exceptionally able jurymen upon a series of complicated transactions extending over many years. They were undoubtedly entitled to make these findings, and it is a prerogative of which Courts of Appeal have of late availed themselves rather liberally. But it is surely still the case that the findings of the first and only original jury, or of the trial judge sitting as such jury, are entitled to much weight, and this position applies with peculiar force when the judge of first in-

stance was a gentleman of such robust intellect and hard-headed common sense as Mr. Justice Mabee. He had the great advantage of seeing and hearing the parties in the case and the solicitor for the bank when they gave their evidence, and his judgment (see 17 O.L.R., at p. 442) is that "there is no element of fraud of any kind in the case. There was the utmost good faith by Mr. Stuart both towards the bank and the plaintiff throughout a long course of dealings in connection with this sulphite company, and so far as the evidence and correspondence discloses, the same upright dealings and good faith extend into all the business transactions had between the guarantors to the bank." It did not seem to occur to him that any fault could be found with the conduct of the solicitor who was also one of the guarantors to the bank, and he says at the close of his judgment (p. 446) that "there certainly are facts that point most strongly to the conclusion that the matter was discussed" between Mrs. Stuart, her family and her son-in-law, a practising solicitor in Hamilton, before she gave the first guarantee, although in the view he took of the case, he did not regard it necessary to decide the point.

Then when the case reaches the Court of Appeal we find judges (or we might say, ad hoc jurors) of such keen intelligence and scrupulous conscientiousness as Mr. Justice Osler and the Chief Justice of Ontario affirming the verdict of the trial judge in the strongest terms. The former says in his judgment at p. 445 of the report cited: "I think the evidence rebuts any inference that the plaintiff was acting under pressure or any undue influence exerted by her husband. She seems to be a person capable of making up her own mind and of forming and acting upon her own uncontrolled opinion. No fraud or deceit was practised upon her, and she understood the nature and effect of the documents she signed and their object."

This is strong enough, but the verdict of the learned Chief Justice is possibly even stronger. He says (p. 451 of the report cited) that "as far as disclosed by an examination of cases decided in the English courts no case has yet arisen similar to

the present one; a case free of all the sinister elements of imposition, deception, misrepresentation, pressure by threats, intimidation or any other sort of duress or undue influence, and where there was knowledge of what was required of the wife and an intention on her part to do it of her own free will and presenting only the one point of absence of independent advice."

If, however, we look, at this case and its surrounding circumstances simply from the view point of strict professional ethics, the path of safety would seem to be indicated as well by the words of Lord Macnaghten in the case before us as by those of Lord Davey in *Willis* v. *Barron* (1902) A.C. 283, where he says: "It is a sound observation that a wife usually has no solicitor of her own apart from her husband, and I think she is primâ facie entitled to look to her husband's solicitor—the solicitor of her husband's family—for advice and assistance, until that solicitor repudiates the obligation to give such advice, and requires her to consult another gentleman." Lord Macnaghten's view of the course which should have been taken by the legal adviser in the case referred to of *Stuart* v. *Bank of Montreal* was, as he says in the conclusion of his judgment, that "he ought to have endeavoured to advise the wife and to place her position and the consequences of what she was doing fully and plainly before her. Probably, if not certainly, she would have rejected his intervention. And then he ought to have gone to the husband and insisted on the wife being separately advised, and, if that was an impossibility, owing to the implicit confidence which Mrs. Stuart reposed in her husband, he ought to have retired from the business altogether and told the bank why he did so."

Our English contemporary, the *Law Times*, also discussess the same subject at some length in the following article:—

"More than a year ago, in an article entitled Status of a Married Woman (128 L.T. Jour. 3), we discussed in these columns the question whether the doctrine of *Huguenin* v. *Baseley*, 14 Ves. 273, Wh. & T., applies to the relation of husband

and wife. It had been definitely decided by the Supreme Court of Canada that this doctrine did so apply, though the balance of authority in the English courts was the other way. As the Canadian case of *Stuart* v. *Bank of Montreal* was the most recent case on the subject, and was likely to come before the Privy Council on appeal, it was then anticipated that the question, whether a transaction between husband and wife, by which the husband benefited, could be set aside on the sole ground that the wife had not had independent legal advice, would have to be decided by the Judicial Committee. Any such decision would have gone very far towards settling the law on this question. From the point of view of scientific jurisprudence this judgment may be said to be disappointing, inasmuch as the appeal was decided on the view of the facts taken by the Judicial Committee, and the rule of law governing transactions between husband and wife with respect to the necessity for independent advice received much less discussion than it had received in the court below."

After referring to the facts of the case and the course of the litigation, the writer continues:—

"The case was thus decided eventually on the footing that, as a matter of fact, unfair advantage had been taken of, and undue influence had been exerted over, the respondent by her husband. The existence of any such rule as was formulated in *Cox* v. *Adams* and the present case by the Supreme Court of Canada, to the effect that mere absence of independent advice in itself and without more entitles a married woman to set aside transactions with or for the benefit of her husband, formed no part of the ratio decidendi. The question, therefore, whether the doctrine of *Huguenin* v. *Baseley* applies to the relation of husband and wife has not, as had been hoped might be the case, been formally decided by the Judicial Committee in *Bank of Montreal* v. *Stuart*.

Nevertheless, in addition to the strong expression of opinion against the correctness of the doctrine "supposed to be laid down in *Cox* v. *Adams*" and adopted in the present case by the Supreme Court of Canada, the judgment delivered by Lord Macnaghten distinctly proceeds on the footing that there is no such

doctrine. For *Nedby* v. *Nedby*, the case cited as correctly laying down the law as to the burden of proof where undue influence by a husband is alleged, is the very case relied on by the present Master of the Rolls (when Mr. Justice Cozens-Hardy) in *Barron* v. *Willis*, 81 L.T. Rep. 321, (1899) 2 Ch., at p. 585, as a definite authority for these propositions: "The relation of husband and wife is not one of those to which the doctrine of *Huguenin* v. *Baseley* applies. In other words, there is no presumption that a voluntary deed executed by a wife in favour of her husband, and prepared by the husband's solicitor, is invalid." This statement of the law has since been approved both in the High Court and in the Court of Appeal: see *Bank of Africa* v. *Cohen*, 100 L.T. Rep. 916, (1909) 2 Ch., at p. 135; and *Howes* v. *Bishop*, 100 L.T. Rep. 826, (1909) 2 K.B. 390. In the latter case it was also pointed out that the statement to the contrary—that *Huguenin* v. *Baseley* does apply to husband and wife—made by Lord Penzance in *Parfitt* v. *Lawless*, 27 L.T. Rep. 215, 2 P. & D., at p. 468, is a mere dictum. The authority of *Parfitt* v. *Lawless* on this point (much relied on by text-writers) may therefore now be considered to be exploded. Another matter that calls for notice is that it was particularly pointed out by Mr. Justice Idington (the dissenting judge in *Stuart* v. *Bank of Montreal*, who declined to acquiesce in the supposed doctrine of *Cox* v. *Adams*) that the present-day Married Women's Property Acts are quite inconsistent with the theory that applies *Huguenin* v. *Baseley* to husband and wife. This point was also touched on by Lord Justice Farwell in the course of the argument in *Howes* v. *Bishop* (p. 394): "I do not see how, at any rate since the Married Women's Property Act, 1882, the rule in *Huguenin* v. *Baseley* can be said to cover the relation of husband and wife." These statements of the law made by Mr. Justice Idington in the Supreme Court of Canada in the present case and by Lord Justice Farwell in the Court of Appeal in *Howes* v. *Bishop* are in accord with the views of the Judicial Committee in *Bank of Montreal* v. *Stuart*. The authority for saying that a transaction by a married woman with her husband cannot now be impeached solely on the ground

that she had no independent advice is far stronger than in 1902, when the Judicial Committee in *Turnbull* v. *Duval*, 87 L.T. Rep. 154, (1902) A.C., at p. 434, expressed no decided opinion on the subject, but rather treated it as being an open question.

It may, therefore, now be taken as a matter hardly open to doubt that the doctrine of *Huguenin* v. *Baseley* does not apply to the relation of husband and wife. Actual proof of undue influence must therefore be given in order to avoid any specific transaction. What proof will be considered as sufficient under particular circumstances may be difficult to determine, but it may be that, in the words of Lord Macnaghten, "when there is evidence of overpowering influence, and the transaction brought about is immoderate and irrational, as it was in the present case, proof of undue influence is complete."

CHAMPERTY AND MAINTENANCE.

We notice that the Divisional Court (Falconbridge, C.J.K.B. and Britton and Riddell, JJ.) have affirmed the judgment of Mr. Justice Middleton in *Colville* v. *Small*, referred to ante, vol. 46, p. 713. The reasons given by the court do not indicate that their Lordships dealt with what appears to be the fundamental question, whether there can be, as a matter of law, champerty without maintenance. As we have already pointed out, the statutory definition of "a champertor" involves "maintenance" as a part of the definition, and if you cannot be a champertor without also being guilty of maintenance, how can a transaction be champertous when the party entering into it is not a champertor? That is a problem which does not appear to be solved.

THE LATE MR. JUSTICE MACMAHON.

The Hon. Hugh MacMahon was of Irish extraction and was the son of the late Hugh MacMahon, who came to Canada from the County Cavan, in Ireland, in 1819. The late judge was born in Guelph, March 6, 1836, and had consequently nearly reached the age of 75. His father was a man of parts, and under his fostering care he received his education. Like other distinguished lawyers, the law was not his first love—early in life he was employed as an engineer, under Lieutenant Col. Galwey on the survey of a proposed Ottawa ship canal.

In 1857 he began his life work and entered on the study of the law. In 1864 he was called to the Bar, and began the practice of his profession at Brantford, where he remained for five years, removing from thence to London, where he had a wider field. In 1876 he received silk from the Lieutenant-Governor of Ontario and in 1885 from the Governor-General.

The late judge was a Liberal in politics, and was employed in 1877 by the Dominion Government on the arbitration proceedings respecting the northern and western boundaries of Ontario. In 1883 he was appointed a puisne judge of the High Court, and has thus been 27 years on the Bench. By common consent of the profession he was regarded as a sound lawyer and one of the very best judges on the Bench in criminal cases.

To all classes of the profession he was most urbane and accessible, distinguished among his brethren as a man at all times of even and judicial temper, before whom it was a pleasure to practise. His memory will be always affectionately cherished by all who had the good fortune to know him; and his dignified and courteous presence on the Bench will be greatly missed.

The late judge had been ailing for some months past, but he was at Osgoode Hall only the week before he died. The end came suddenly on January 18th. The profession of Ontario have lost a judge and a friend whom they had learned to regard with the utmost esteem and respect.

THE SENTENCING OF PRISONERS.

The sentencing of prisoners has always been a subject of grave difficulty and much discussion. It is one of the difficult problems presented to judges from time to time and it is scarcely fair without a full knowledge of the facts and the surrounding circumstances to criticize any sentence which has been imposed even though it may seem either inadequate or too severe. His Honour Judge Morgan, one of the junior judges of the County of York, has recently come in for considerable criticism in this regard at the hands of the press and police authorities of the city of Toronto. It has been hinted that his leniency has ceased to be of that paternal preventive character which was apparently his desire and has become rather provocative of crime. One, however, cannot rely on newspaper reports for accuracy, and that which would sometimes seem to have been a very serious mistake on the part of a judge cannot always be so designated when the facts have been investigated. The learned judge referred to is reported to have let a woman go on suspended sentence who had pleaded guilty to theft from her employers and who, it was said, had previously been convicted for similar offences. It appears, however, that she had only been accused of several similar offences. There is, of course, a material difference. However that may be, the judge assumed a serious responsibility in taking the course he did.

Another phase of the subject is that the judge referred to and some others, who could be mentioned, deal with cases before them on the basis of what they call "merciful leniency," as being the best for persons charged with crime. It must be remembered, however, that justice is not administered in relation to the future of the criminal only, but mainly the protection of society and the prevention of crime. Whilst it is most desirable, so far as is consistent, that there should be endeavours made to reform criminals, judges should have in view the more important consideration of the safety of the community at large.

LANGUAGE v. LAW.

The demand made by the leaders of the French population in the Province of Quebec that all railway tickets, time tables, etc., should be printed in French as well as in English, makes very clear some important features in our political condition. How a railway ticket can be printed in two languages when the name of the place remains the same in either, it is hard to understand, but the absurdity of the demand only emphasizes its political importance. Two facts stand prominently forth which are worthy of the consideration of those who speak so fervently and eloquently of the unity of the two races, and the consolidation of the Dominion as its happy result. The demand above referred to having been properly rejected by the Parliament of the Dominion, and improperly and illegally, in our opinion, accepted by the Provincial Assembly, and having after some demur been agreed to by the railway authorities, is removed from present controversy, but remains to point the moral if not to adorn the tale.

The facts to which we would call attention are, first, the evidence given of the tenacity with which, even in so trivial a matter, the French Canadian holds to his policy of maintaining intact the use of his language, the independence of his race, and, secondly, the conclusion to be drawn from the easy yielding to so preposterous a demand by the railway companies, involving to them very considerable expense and inconvenience without any compensating advantage. When even a railway company has to take into account the loss it may sustain from the hostility of the population which it serves, based upon such trivial grounds as those above referred to, further comment is needless.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

ADMIRALTY—BERTH NOTE—"DISPUTE ARISING AT LOADING PORTS" —ARBITRATION—STAY OF PROCEEDINGS.

The Dawlish (1910) P. 339. This was an appeal from the order of a judge of a County Court dismissing the action with costs. By a berth note it was agreed between the plaintiffs (shipowner) and defendants (grain merchants) that the plaintiffs' ship should go to the sea of Azov, and there load a cargo of grain, and in case of "any dispute at loading ports" under this berth note it is to be submitted to a specified court of arbitration whose decision was to be final. The vessel was loaded, and for stevedoring the defendants charged 40 roubles per 1,000 chelverts in accordance with the tariff on the margin of the berth note, and deducted the amount from the freight. On the accounts being received by the plaintiffs' London agent it was objected that the defendants had overcharged and the action was brought to recover the difference, but the Divisional Court (Evans, P.P.D., and Deane, J.) dismissed the appeal, holding that it was a dispute within the arbitration clause, it being a dispute as to the proper charges for stevedoring at the port of loading.

ADMIRALTY — SALVAGE — APPEAL COURT REDUCING AMOUNT OF SALVAGE.

The Port Hunter (1910) P. 343. This was an appeal against the amount awarded for salvage by Deane, J. The defendants' steamship with a cargo of wool bound for England broke down in the Red Sea owing to damage to her propeller. She was picked up by the plaintiffs' vessel and towed for six days, about 830 miles, to a safe anchorage in Suez Roads. The weather was fine except towards the end of the towage, when the usual northerly wind and some sea were encountered. The salving vessel lost three days and had been put to expense, amount not stated. The salving vessel cargo and freight were valued at £88,000 and the salved vessel cargo and freight at £269,700. Deane, J., had awarded £10,000, but the Court of Appeal (Williams and Buckley, L.JJ., and Evans, P.P.D.) reduced the amount to £6,000, being of the opinion that the court below had

not sufficiently taken into account the fact that there was no considerable danger incurred, and that it was merely a matter of towage and the consequent delay and expense.

COMPANY—RECEIVER AND MANAGER—SHIPMENT OF GOODS BY RECEIVER—BILL OF LADING—LIEN FOR PREVIOUSLY UNSATISFIED FREIGHT.

Whinney v. *Moss SS. Co.* (1910) 2 K.B. 813. The plaintiff in this case had been appointed the receiver and manager of a brewery company, and carried on the business in its name and as such receiver in the name of the company requested the defendant to carry a quantity of beer to be delivered in Malta. The bill of lading stipulated that the defendants were to have a lien on the goods for the freight and also for any other freight due from "the shippers or consignees" to them. The defendants refused to deliver the beer at Malta without payment of certain unsatisfied freight due to them by the brewery company on previous transactions. This demand was paid under protest and the present action was brought to recover it and the simple question was whether or not the defendants had had a valid lien therefor. Hamilton, J., who tried the action gave judgment for the defendants but the Court of Appeal (Williams, Moulton and Buckley, L.JJ.) came to the conclusion (1) that the bill of lading had not the effect of giving them a lien, and (2) that it was not competent for the plaintiff to give the defendants such a lien without the leave of the court. The defendants being aware that the plaintiff was carrying on the business of the company as receiver and manager and having really dealt with him on that footing the court considering it immaterial whether or not they knew he had been appointed by the court.

CONTRACT—CONSTRUCTION—RIGHT OF ENTRY FOR SPECIAL PURPOSE—RIGHT OF OWNER TO USE LAND FOR SIMILAR PURPOSE.

Reid-Newfoundland Co. v. *Anglo-American Telegraph Co.* (1910) A.C. 560. By agreement between the defendant railway company and the plaintiff telegraph company the latter were given the exclusive right to erect and work telegraph lines on the railway company's property, and were bound to furnish a special wire for the purposes of the railway as it existed at the date of the contract. The railway company having proceeded to erect wires on their property for their own purposes, this

action was brought to restrain them from so doing as being a violation of the agreement. The Supreme Court of Newfoundland held that the plaintiffs were entitled to an injunction, but the Judicial Committee of the Privy Council (Lords Macnaghten, Collins and Shaw and Sir A. Wilson) reversed that judgment, being of opinion that the grant of an exclusive right to the telegraph company to erect and work wires did not preclude the railway from also erecting wires for the purposes of its own business.

FIRE INSURANCE—POLICY—EXEMPTION FROM LIABILITY IN CASE GASOLINE IS STORED ON PREMISES—CONSTRUUCTION—"STORED OR KEPT."

In *Thompson* v. *Equity Fire Insurance Co.* (1910) A.C. 592, the Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson, Shaw and Mersey,) have reversed the decision of the Supreme Court of Canada. The case turns on the construction of a policy of fire insurance which exempted the insurers from liability in case gasoline should be "stored or kept" on the premises insured. It appeared that the fire was caused by a small quantity of gasoline in a stove which was being used for cooking purposes, no other gasoline being in the building. The judge at the trial considered that "stored or kept" connoted something in the nature of dealing in such articles or having a storehouse therefor. The Ontario Court of Appeal affirmed this judgment, but the Supreme Court by a majority reversed it. The Judicial Committee agreed with the judge at the trial and the Court of Appeal.

MARINE INSURANCE—INSURANCE AGAINST TOTAL LOSS OF CARGO "BY TOTAL LOSS OF VESSEL"—CONSTRUCTION.

Montreal Light, Heat and Power Co. v. *Sedgwick* (1910) A.C. 598. This was an action on a policy of insurance on a cargo of cement against total loss "by total loss of vessel." The cargo consisted of cement, the vessel was a barge and had been wrecked and practically, if not entirely, submerged, whereby both the vessel and cargo became a total loss and were abandoned as such. The defendants contended that the barge might have been restored to as good order and condition as she was in prior to the disaster for $1,046.48 and that a portion of the cargo could have been salved. The jury found in effect that the loss covered

by the policy had occurred, and the judge at the trial gave judgment for the plaintiff. The Supreme Court of Canada set aside this judgment and ordered a new trial on the question whether the barge was in fact a total loss; but the Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson, Shaw and Mersey and Sir E. Taschereau) reversed this judgment and restored the judgment given at the trial, holding that from the nature of the cargo, and the facts proved, there was ample evidence to support the finding of the jury that the loss insured against had occurred.

ACTION FOR DAMAGES FOR DEATH OF PLAINTIFF'S SON—NEGLIGENCE OF DEFENDANTS—MISDIRECTION AS TO CONTRIBUTORY NEGLIGENCE—JUDGE'S CHARGE NOT EXCEPTED TO AT TRIAL—NEW POINT TAKEN ON APPEAL.

White v. *Victoria Lumber Co.* (1910) A.C. 606. This was an action under a Fatal Accidents Act, or Employers' Liability Act to recover damages for the death of the plaintiff's son while acting as an engineer on the defendant's lumber train. The plaintiff claimed that the train was equipped with defective brakes, and that the brakeman employed was incompetent. The train got beyond control and was running down hill and the deceased jumped from the engine and was killed. It was also claimed that a siding or safety switch on the railway was unfit for the purpose for which it was provided. The defendants contended that there was no negligence on their part, but that the deceased was guilty of negligence in not keeping proper control of his engine and train and allowing it to travel at too great a speed on a down-grade. The jury found a verdict for the plaintiff and the judge at the trial gave judgment in his favour. On a motion against the verdict and judgment Hunter, C.J., thought the proper inference from the evidence was that the accident was caused by want of care of the deceased, and that judgment should be entered for the defendants, or, if not, that there should be a new trial. Irving, J., thought that the damages were excessive and that there should be a new trial on that ground. Morrison, J., thought the judgment at the trial should be affirmed. In these circumstances a new trial was ordered by the Supreme Court of British Columbia from which the plaintiff appealed to His Majesty in Council and the Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson, Shaw and Mersey and Sir E. Taschereau) reversed the order

of the Supreme Court of British Columbia and affirmed the judgment at the trial. On the appeal the defendants raised an objection on the ground of misdirection as to the question of contributory negligence which had not been taken at the trial nor in the court below, which their Lordships refused to entertain.

PRINCIPAL AND AGENT—COMMISSION ON SALE OF MINING PROPERTY —SALE ON TERMS DISAPPROVED BY AGENT—AGENT, EFFICIENT CAUSE OF SALE.

Burchell v. *Gourie and Blockhouse Collieries* (1910) A.C. 614. This was an action by an agent to recover a commission on a sale of mining property. The agent was employed to procure a purchaser and had introduced to the vendors a company which ultimately became the purchasers, but on terms disapproved of by the agent. The official referee to whom the action was referred had found in favour of the plaintiff, but the Supreme Court of Nova Scotia reversed his finding and gave judgment dismissing the action and the Supreme Court of Canada dismissed an appeal therefrom. On appeal, however, the Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson, Shaw and Mersey), came to the conclusion that the referee was right and reversed the decision of the Supreme Court of Canada and restored the judgment of the referee.

COMMON SCHOOL LANDS FUND—ONTARIO AND QUEBEC—ARBITRATION—JURISDICTION OF ARBITRATORS.

Attorney-General (*Quebec*) v. *Attorney-General* (*Ontario*) (1910) A.C. 627. This was an appeal from the Supreme Court of Canada. In pursuance of statutory authority the three governments of Canada, Ontario, and Quebec, entered into a submission to arbitration as to matters arising out of the settlement of accounts under an award relating to the Common School Fund—and on behalf of Quebec it was claimed that certain moneys not actually received by Ontario should be regarded as constructively received by Ontario for the purpose of the division, the sums in question being the amount of certain deductions which Ontario was only entitled to make at its own expense. The Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson, Shaw and Mersey) held that the Supreme Court of Canada was right in holding that the arbitrators had no

jurisdiction to deal with anything except moneys actually received, and that the terms of the submission could not be extended to cover constructive receipts.

TREATY EXTINGUISHING INDIAN RIGHTS IN ONTARIO LANDS — PAYMENTS MADE UNDER INDIAN TREATY—RIGHT OF DOMINION TO INDEMNITY FROM PROVINCE BENEFITED.

Canada v. *Ontario* (1910) A.C. 637. This was a contest between the governments of Canada and Ontario as to whether or not the Dominion government was entitled to be indemnified by the province for payments made to Indians under the Indian Treaty of October 3, 1873, whereby Indian rights were relinquished in a large tract of land part of which was within the province of Ontario. Burbidge, J., who tried the case, gave judgment in favour of the Dominion, but his judgment was reversed by the Supreme Court of Canada and on appeal to His Majesty in Council, the Judicial Committee of the Privy Council (Lords Loreburn, L.C., and Lords Macnaghten, Atkinson, Shaw and Mersey) were of the opinion that having regard to the jurisdiction conferred on the Exchequer Court, the action was properly dismissed as not being sustainable on any principle of law; that the treaty in question had not been made by the Dominion government as trustee or agent for the Province, or with its consent, or for the benefit of the lands in question, but with a view to great national interests—that is, for distinct and important interests of the Dominion, in pursuance of the powers derived from the British North America Act. Some of the judges in the courts below relied on a dictum of Lord Watson in *St. Catharines Milling and Lumber Co.* v. *The Queen*, 14 App. Cas. 60: "Seeing that the benefit of the surrender accrues to her, Ontario must, of course, relieve the Crown and the Dominion of all obligations involving payment of money, which were undertaken by Her Majesty, and which are said to have been in part fulfilled by the Dominion Government." But their Lordships hold that this was obiter; which serves to shew how dangerous it is for even profound lawyers to express an opinion even on points which seem, but may not in fact be, obvious.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Alta.] FINSETH *v.* RYLEY HOTEL CO. [Nov. 2, 1910.

Appeal—Jurisdiction—Special leave—Judicial proceeding—Discretionary order—Matter of public interest—Alberta Liquor License Ordinance, s. 57—Originating summons.

An originating summons issued by a judge of the Supreme Court of Alberta on an application for cancellation of a license under s. 57 of the Liquor License Ordinance, is a judicial proceeding within the meaning of s. 37 of the Supreme Court Act, R.S.C. 1906, c. 139, and, consequently, the Supreme Court of Canada has jurisdiction to entertain an application for leave to appeal from the judgment of the Supreme Court of Alberta thereon.

Where the decisions of the provincial courts shew that the judges of that court are equally divided in opinion as to the proper construction of a statute in force in the province and it appears to be desirable in the public interest that the question should be finally settled, it is proper for the Supreme Court of Canada to exercise the discretion vested in it for the granting of special leave to appeal under the provisions of s. 37 of the Supreme Court Act. GIROUARD, J., dissented on the ground that the proceedings in question were intended to be summary and that in these circumstances, the case was not one in which special leave to appeal should be granted.

Motion granted.

Chrysler, K.C., for the application. *Ewart*, K.C., contra.

Que.] [Nov. 2, 1910.

TOWN OF OUTREMONT *v.* JOYCE.

Appeal—Jurisdiction—Matter in controversy—Instalment of municipal tax—Collateral effect of judgment.

In an action instituted in the Province of Quebec to recover the sum of $1,133.53 claimed as an instalment of an amount exceeding $2,000, imposed on the defendant's lands for special

taxes, the Supreme Court of Canada has no jurisdiction to entertain an appeal, although the judgment complained of may be conclusive in regard to further claims arising under the same by-law which would exceed the amount mentioned in the statute limiting the jurisdiction of the court. *Dominion Salvage and Wrecking Co.* v. *Brown*, 20 Can. S.C.R. 203, followed. Appeal quashed with costs.

Davidson, K.C., for the motion. *Beaubien*, K.C., contra.

Man.] LONGMORE *v.* MCARTHUR. [Nov. 2, 1910.

Negligence — Dangerous works — Joint tortfeasors — Judgment against one of several persons responsible for damages—Bar to action.

Held, 1. A proprietor or principal contractor undertaking works in the circumstances inherently dangerous cannot delegate the duty of providing against such danger so as to escape personal responsibility if that duty be neglected.

2. Failure to discharge such duty makes the proprietor and his contractor, or the contractor and his sub-contractor, as the case may be, equally liable as joint tortfeasors for resultant injury.

3. A judgment for damages sustained in consequence of any such injury against one of such joint tortfeasors is a bar to a subsequent action therefor against another.

Judgment appealed from (19 Man. R. 641) affirmed.

A. C. Galt, K.C., for appellant. *Ewart*, K.C., for respondents.

Man.] [Nov. 2, 1910.

DOMINION FISH CO. *v.* ISBESTER.

Appeal—Concurrent findings of fact—Negligence—Shipping—Action for damages—Personal injury—Evidence—Res ipsa loquitur—Limitation of liability.

Concurrent findings on questions of fact in the courts below ought not to be disturbed on appeal unless a mistake is clearly shewn.

A ship lying at her dock caught fire during the night and was destroyed. The officers of the ship failed to arouse passengers in time to permit them to escape in safety, and, in an action to recover damages for injuries sustained in consequence by a

passenger, the owners adduced no evidence to explain the origin of the fire.

Held, affirming the judgment appealed from (19 Man. R. 430), that the only inference to be drawn was that the owners were grossly negligent.

In such an action the owners of the ship cannot invoke the limitation provided by s. 921 of the Canada Shipping Act, R.S.C. 1906, c. 113. *The Orwell,* 13 P.D. 80, and *Roche* v. *London and South Western Ry. Co.* (1889) 2 Q.B. 502, referred to.

Appeal dismissed with costs.

Affleck, for appellants. *Blackwood,* for respondent.

Alta.] [Nov. 2, 1910.

GRAND TRUNK PACIFIC RY. CO. *v.* WHITE.

Construction of statute—Public Works Health Act—Regulations —Breach of statutory duty.

Sec. 3 of the Public Works Health Act, R.S.C. 1906, c. 153, provides that "for the preservation of health and the mitigation of disease amongst persons employed in the construction of public works, the Governor-General in Council may from time to time make regulations . . . (*d*) for the provision of hospitals on the works and as to the number, location and character of such hospitals; . . ."

Held, that the above works "for the preservation of health and mitigation of disease" govern the construction of the whole section and a company directed to provide a hospital for such purpose is not obliged to furnish it with applications for treating employees personally injured on its works. Appeal allowed with costs.

Chrysler, K.C., for the appellants. *Ewart,* K.C., for the respondents.

Que.] [Nov. 21, 1910.

SHAWINIGAN HYDRO-ELECTRIC CO. *v.* SHAWINIGAN WATER & POWER CO.

Appeal—Jurisdiction—Matter in controversy—Stare decisis— Municipal by-law—Injunction—Contract—Collateral effect of judgment—Construction of statute—Supreme Court Act, R.S.C. 1906, *c.* 139, *ss.* 36, 39(*e*), 46.

The action was brought by the respondents and other ratepayers of the town of Shawinigan, against the town and Hydro-

Electric Company, to set aside a by-law of the town corporation authorizing the purchase of certain lands with an electric power-house and plant from the Hydro-electric Company for $40,750, and for an injunction prohibiting the carrying into effect of the contract of sale. The final judgment in the Superior Court dissolved the injunction and dismissed the action, but on appeal by the plaintiffs the Court of King's Bench maintained the action and made the injunction permanent. On a motion to quash an appeal by the Hydro-Electric Company to the Supreme Court of Canada,

Held, per FITZPATRICK, C.J., and GIROUARD, J., that the Supreme Court was competent to entertain the appeal under the provisions of s. 39(*e*) of the Supreme Court Act. *Bell Telephone Co.* v. *City of Quebec*, 20 S.C.R. 230, disapproved.

Per DUFF and ANGLIN, JJ. Semble, that the decision in that case is binding on the Supreme Court of Canada.

Per IDINGTON, DUFF and ANGLIN, JJ (DAVIES, J., contra), that as the appeal was from the final judgment of the highest court of final resort in the Province of Quebec in an action instituted in a court of superior jurisdiction for the purpose of preventing the consummation of a contract for a consideration exceeding $2,000, the Supreme Court of Canada was competent to entertain the appeal under ss. 36 and 46 of the Supreme Court Act.

Per DAVIES, J., dissenting, that the controversy related merely to the validity of the by-law and did not involve the sum or value of $2,000, that the collateral or incidental effects of the judgment were not in question on the appeal, and that, therefore, the Supreme Court of Canada was not competent to entertain the appeal. *Bell Telephone Co.* v. *City of Quebec*, 20 S.C.R. 230, followed.

Motion dismissed with costs.

Holden, for the motion. *Aimé Geoffrion*, K.C., contra.

Ont.] SOVEREIGN BANK *v.* MCINTYRE. [Dec. 23, 1910.

Evidence—Burden of proof—Banks and banking—Sale of bank stock—Offer to shareholders—Shares refused or relinquished —Sale to public—Authority.

A bank sued M. on a promissory note alleged to have been given in payment for part of a new issue of its stock. M. pleaded want of consideration and non-receipt of the shares. On the

trial a resolution by the bank's directors was proved authorizing the offer of the new issue to the then shareholders (of whom M. was not one) and counsel for the bank admitted that there was none allotting it to anybody else.

Held, 1. IDINGTON and DUFF, JJ., dissenting, that the onus was on M. to prove that the shares had been sold to the public without authority and he had failed to satisfy it.

2. Per IDINGTON and DUFF, JJ., that the onus was originally on M., but the evidence and admission of counsel had shifted it to the bank, which did not furnish the requisite proof.

Appeal allowed with costs.

C. Macdonell, K.C., for appellants. *McEvoy*, K.C., for respondent.

Ont.] RODD *v.* COUNTY OF ESSEX. [Dec. 23, 1910.

Municipal corporation—Statutory duty—County officers—Office accommodation—Discretion—Mandamus.

The selection of the place in an Ontario county at which an office shall be provided for the County Crown Attorney and clerk of the peace rests with the County Council and the courts should not interfere with the reasonable exercise of the council in making such selection.

Judgment of the Court of Appeal, 19 Ont. L.R. 659, affirmed. Appeal dismissed with costs.

Wigle, K.C., for appellant. *A. H. Clarke*, K.C., for respondent.

Province of Ontario.

COURT OF APPEAL.

Full Court.] BEARDMORE *v.* CITY OF TORONTO. [Dec. 30, 1910.

Appeal to Privy Council—Application for leave.

This was an application on behalf of the plaintiff for the allowance by the court of the security required to be given on an appeal to the Judicial Committee of the Privy Council as provided by 10 Edw. VII. c. 24. The decision to be appealed from is reported in 21 O.L.R. 505.

Held, 1. That whilst the nature of the case and the question raised undoubtedly bring it within a class of cases in which not infrequently the Judicial Committee have considered it proper to grant leave to appeal the granting or refusing of which rests entirely with the Judicial Committee.

2. The Act under which the application is made, only confers on the Court of Appeal the power to deal with this application where the case comes within s. 2 and it has been decided that it does not: see *City of Toronto* v. *Toronto Electric Light Co.*, 11 O.L.R. 310; *Canadian Pacific Ry. Co.* v. *City of Toronto* (1909) 19 O.L.R. 661.

Johnston, K.C., and *Lundy*, for application. *Drayton*, K.C., contra.

HIGH COURT OF JUSTICE.

Divisional Court—C.P.] [Dec. 12, 1910.

FOSTER *v.* RENO.

Distress for taxes—Seizure of stranger's property on premises—Tax collector—Validity of appointment—De facto officer of municipality.

Appeal by plaintiff from the judgment of the County Court of Kent dismissing an action against a tax collector for wrongful distress. The person assessed as owner of the land in question and of the horse that was seized made a chattel mortgage to one Shaw. As further security a collateral note was taken by the mortgagee endorsed by three persons interested in the racing of the horse. After demand for the taxes an arrangement was made, evidenced by a document recorded under the Bills of Sale Act, by which the horse was transferred to the plaintiff to hold as security for the protection of the endorsers. The owner agreed to care for the horse, and was at liberty to enter it at the races. It was then removed from his premises and boarded at an hotel stable. When out for exercise the owner of the premises took it for a temporary purpose to his place where it was seized by the defendant and sold for taxes.

Held, 1. Under 4 Edw. VII. c. 23, s. 103, the right to distrain for taxes is placed upon the same plane as a landlord's right to distrain for rent, and the horse being on the land, and the plaintiff claiming title thereto under the person taxed, there

was no reason why full effect should not be given to the words of the statute. The distress was therefore valid.

It was contended that the defendant was not a duly appointed tax collector. In 1908 he was admittedly duly appointed; but in 1909 his appointment was by resolution and not by by-law.

Held, that although s. 325 of the Municipal Act enacts that the powers of the council shall be exercised by by-law; yet the council is also an administrative body, whose duties can be discharged without the formality of a by-law, and s. 325 refers to the exercise of a municipal legislative power and not to the performance of a statutory duty. See *Croft* v. *Peterboro*, 5 C.P. 541; *Pratt* v. *City of Stratford*, 14 O.R. 260, 16 A.R. 5.

Held, also, that the duty of the council to appoint assessors or collectors may be discharged in any way indicating corporate action, e.g., by resolution.

Appeal dismissed with costs.

Gundy, for plaintiff. *Wilson*, K.C., for defendant.

Master in Chambers.] [Dec. 12, 1910.

VACHON *v.* CROWN RESERVE MINING CO.

Parties—Joinder of defendants—Separate causes of action—Tort —Breach of contract.

Motion by defendants to strike out so much of the statement of claim as dealt with the claim against the defendants, the Maryland Casualty Co. The statement of claim set out that the plaintiff on Nov. 28, 1909, was seriously injured while in the service of the defendants, the Crown Reserve Mining Co., and that, upon his making a claim for damages against those defendants, the defendants, the Maryland Casualty Co., began negotiations with the plaintiff on behalf of themselves and the mining company, looking to a settlement, and that finally, on May 14, 1910, an agreement was made between the plaintiff and defendants, under which the defendants were to pay $3,500 in full settlement to the plaintiff; but that on May 28, the defendants refused to carry this out. The plaintiff claimed from both defendants payment of this $3,500, with interest from May 14, 1910, or, in the alternative, $1,500 damages from the mining company.

Held, that the plaintiff was seeking to join two entirely separate and distinct causes of action—first, an action of tort against the mining company, and, second, an action for breach of

an alleged agreement of settlement—and these could not be joined, being inconsistent and mutually destructive, and not both against the same defendants: *Andrews* v. *Forsyth*, 7 O.L.R. 188; *Quigley* v. *Waterloo Manufacturing Co.*, 1 O.L.R. 606; *Evans* v. *Jaffray*, ib. 614, 621. However numerous the defendants, there must be only one claim for relief, based on one injuria in which all are alleged to be implicated. Motion granted with costs.

G. M. Clark, for defendants. *J. A. Macintosh*, for plaintiff.

Clute, J.] HOUGHTON *v.* MAY. [Dec. 15, 1910.

Execution — Seizure of ship under fi. fa. — Ship wrongfully brought by execution creditor from foreign waters into sheriff's bailiwick—Public policy—International law—Ashburton Treaty, art. 7.

This was an issue in which the plaintiff affirmed and the defendant denied that the ship "Houghton," seized by the sheriff of Essex, under an execution issued in *May* v. *Houghton*, was improperly brought by the defendant, or with his connivance by others, into the bailiwick of the sheriff of Esesx, or came within his bailiwick under such circumstances that the ship was not exigible in execution, and that the seizure was an abuse of the process of the court, and the ship should be released.

The trial judge found that the vessel was cut loose either by the orders of the defendant or with his connivance.

Held, 1. It would be against public policy and might create international trouble to permit a seizure under such circumstances.

2. There was a trespass committed, if not a crime, and as the defendant seeks to take advantage of the wrongful act, he ought not to be permitted to do so. See *Edgerton* v. *Barlow*, 4 H.L.C. 1, 196, and Ashburton Treaty, 1842, art. 7.

3. It is not clearly apparent that this article of the treaty applies to the channel between Detroit and Windsor; but, if it did apply, it would not help the plaintiff, if his property was properly within the bailiwick of the sheriff.

A. H. Clarke, K.C., for plaintiff. *E. S. Wigle*, K.C., for defendant.

Meredith, C.J., Sutherland, J., Middleton, J.] [Dec. 23, 1910.

APPLEBY *v.* ERIE TOBACCO CO.

Nuisance—Tobacco factory—Injunction.

Appeal by plaintiff from judgment of Boyd, C., dismissing an action to restrain defendants from continuing a nuisance.

The nuisance complained of arose from the manufacture of tobacco, the important objection was the odour arising from the steaming and stewing of the tobacco leaves, other articles being mixed with it, such as sugar and liquorice. These odours could not be prevented. The evidence was conflicting, but it was clear that there was a strong odour that to most neighbours was extremely disagreeable.

Held, 1. That in view of all the surrounding circumstances (which must always be taken into consideration) the defendants' manufactory constituted a nuisance.

2. As to whether an injunction should be granted, MIDDLETON, J., who delivered the judgment, said:—

Nuisances fall into two classes—those which interfere with the comfort and enjoyment of the property, and those which interfere with the value of the property. The occupant may sue in respect of the former. In such suit an injunction may well be awarded, as damages cannot be an adequate remedy: *Jones* v. *Chappell*, L.R. 20 Eq. 539. The working rule stated by A. L. Smith, L.J., in *Sheefer* v. *City of London Electric Co.*, [1894] 1 Ch., at p. 332, as defining the cases in which damages may be given in lieu of an injunction, shews that here an injunction is the proper remedy. No one should be called upon to submit to the inconvenience and annoyance arising from a noxious and sickening odour for a 'small money payment,' and the inconvenience and annoyance cannot be adequately 'estimated in money.' The cases in which damages can be substituted for an injunction sought to abate a nuisance of the first class must be exceedingly rare. The injunction should, therefore, go, restraining the defendants from so operating their works as to cause a nuisance to the plaintiff by reason of the offensive odours arising from the manufacture of tobacco; the operation of the injunction to be stayed for six months to allow the defendants to abate the nuisance, if they can do so, or to make arrangements for the removal of that part of the business causing the odour.

Rodd, for plaintiff. *Clarke*, K.C., for defendant.

Meredith, C.J., Teetzel, J., Clute, J.] [Dec. 24, 1910.

FOWELL *v.* GRAFTON.

Negligence—Sale of air-gun to minor—Injury to person—Liability—Crim. Code, s. 119.

Appeal by defendants from the judgment of Britton, J., 20 O.L.R. 539, in favour of the plaintiff, upon the findings of a jury, holding the defendants, who sold an air-gun to a boy of thirteen, liable to the plaintiff, who was injured by a shot fired from the gun in the hands of the boy, for their negligence in selling it to a minor under sixteen.

MEREDITH, C.J., said: It appears from the considered judgment of the learned judge, 20 O.L.R. 639, that he was of opinion that, apart altogether from the question of negligence, as the air-gun was sold to the boy in contravention of the provisions of the Code, sec. 119, the defendants were liable to answer in damages to the plaintiff for the injury which he sustained, the unlawful act being, in his opinion, the proximate cause of the injury. The object of the provision of s. 119 of the Code was the prevention of such accidents as that which happened to the plaintiff, and, that being the case, the view of the learned judge is supported by a statement in Pollock on Torts, 8th ed., pp. 26, 27. But, however that may be, I am of opinion that there was evidence for the jury that the plaintiff's injuries were caused by the defendants' negligence, and that there was no misdirection.

I think, also, that the learned judge was right in telling the jury that the fact that the danger to the public of an air-gun or ammunition being in the hands of a minor under the age of sixteen was deemed by the legislature of so serious a character as to render it proper that it should be made a criminal offence to sell or give either the air-gun or ammunition for it, was a factor they might take into account in determining whether the defendants were guilty of the negligence with which they were charged.

Appeal dismissed with costs.

Counsell, for plaintiff. *Lynch-Staunton,* K.C., for defendant.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] [Dec. 3, 1910.

ROBINSON *v.* IMPERIAL LIFE ASSURANCE CO.

Life insurance—Security for advances—Words "as interests may appear"—Debt barred by statute.

A policy of life insurance issued by the defendant company upon the life of R. S. was made payable to B. "as his interests may appear." Subsequently the insured directed the company in writing to make the amount payable to plaintiff "as his interests may appear" explaining that B. was to have made him an advance of a sum of money, but had been unable to do so and that this was his "reason for changing the beneficiary in the contract."

Held, that plaintiff's claim must be restricted to the amount of his advance made at the time and that he could not recover or retain by virtue of the words "as his interests may appear" a large sum claimed by him for services alleged to have been rendered to the deceased in his lifetime and which had been barred by the Statute of Limitations.

O'Connor, K.C., in support of appeal. *W. B. A. Ritchie*, K.C., contra.

Full Court.] MOORHEAD *v.* KAULBACH. [Dec. 15, 1910.

Probate court—Proof of claim against estate—Necessity for corroboration—Material fact—Amendment—Power of judge to allow.

On the contestation of a claim made by M. against the estate of K., deceased, where plaintiff's claim as rendered in the first instance, was for the sum of $700, for the publication for one year, from December, 1903, to December, 1904, of a newspaper for the deceased, the judge allowed the substitution of a claim under an agreement in writing whereby the claimant was to publish the paper in question, using the plant belonging to deceased, and upon delivery up to the deceased at his request the subscription list was to receive the sum of $500.

Held, 1. The delivery of the subscription list was a material fact which must be substantiated by corroborative evidence to entitle the claimant to recover.

2. The fact that the paper suspended publication about the time that the list was said to have been surrendered had no bearing as furnishing the element of corroboration required.

Quære, whether the judge had power to permit the amendment allowed by him to be made.

Mellish, K.C., and *Kaulbach*, for appellant. *O'Connor*, K.C., and *Matheson*, K.C., for respondent.

Full Court.] CARR *v.* FERGUSON. [Dec. 15, 1910.

Crown lands—Temporary acts of occcupation—Municipal council—Laying out new road—Irregularities—Waiver—Commissioner—Jurisdiction—Obstructions—Right to remove.

To give title or possessory rights as against the Crown the proof should be clear and unequivocal.

The occupation and use of land on the seashore where the acts of occupation (apart from the erection of small structures not of a permanent character) are shewn to have been of a casual, temporary and irregular character, in the absence of enclosure or anything to indicate the extent of possession, are not sufficient to give title as against the Crown.

The occasional use of a strip of beach and land adjacent thereto, the property of the Crown, for the purpose of drying nets, etc., will be regarded as having occurred in the exercise of public right and will not confer any special right or interest in the locus. Such acts are not sufficient to enable the persons exercising them to maintain trespass against a person in possession claiming under colour of title.

Where a municipal council is seized with jurisdiction to deal with the subject of opening up a new road mere irregularities in the procedure cannot be relied on by way of collateral attack. The task of locating the new road belongs in the first place exclusively to the commissioner.

Objections to the project as a whole, or as to the location or payment of damages, etc., may be urged when the council is asked to confirm or adopt the proceedings and where such objections are not then urged they cannot be afterwards raised as ground for invalidating the prior proceedings. The municipal authorities having entered, or being entitled to enter, have the right, especially after notice, to remove obstructions from the way.

Rowlings, for appeal. *Gregory*, K.C., contra.

Graham, E.J.] LORRAINE *v.* NORRIE. [Jan. 7.

Watercourses — Riparian rights — Obstructions — Abatement of nuisance—Assault in course of—Costs.

Where one of two riparian proprietors on opposite sides of a river, for the protection of his land against the current, erected structures known as "wing dams," extending for some distance into the bed of the river, the effect being to raise the height of the water at the outer ends, and to increase the velocity of the current, and to deflect it against the land of the opposite proprietor.

Held, that the latter was entitled to recover damages for the injury to his land, and to an injunction for the removal of the structures causing the injury.

Quære, whether a party lawfully entering upon the land of another for the purpose of abating a nuisance but committing acts of excess in overcoming the resistance of the owner does not thereby become a trespasser ab initio.

W. B. A. Ritchie, K.C., and *H. McKenzie*, K.C., for plaintiff. *J. J. Ritchie*, K.C., and *S. D. McLellan*, K.C., for defendant.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] SCHRAGGE *v.* WEIDMAN. [Nov. 28, 1910.

Conspiracy in restraint of trade—Criminal combination—Illegal contract—Crim. Code, s. 498, s.-ss. (b) and (d).

Appeal from judgment of MATHERS, C.J., noted, vol. 46, p. 510, allowed with costs.

Held, RICHARDS, J.A., dissenting, that, although the agreement in question was one which, to a certain extent, tended to prevent or lessen competition, it was one which, at common law, would be enforcible between the parties, because its provisions were not unreasonable in their restraint of competition, and therefore such restraint should not be held to be "undue" within the meaning of sub-s. (*d*) of s. 498, of the Criminal Code.

Rex v. *Clarke*, 14 Can. Cr. Cas. 46; *Wampole* v. *Karn*, 11 O.L.R. 619, and *Rex* v. *Elliott*, 9 O.L.R. 648, distinguished. *Nor-*

denfeldt v. *Maxim Nordenfeldt & Co.* (1894) A.C. 535; *Mogul Steamship Co.* v. *McGregor* (1892) A. C. 25; *Collins* v. *Locke*, 4 A.C. 674, and *Elliman* v. *Canington* (1901) 2 Ch. 275, followed.

Macneill, for plaintiff. *F. M. Burbidge*, for defendants.

Full Court.] MILLER *v.* SUTTON. [Nov. 28, 1910.

Vendor and purchaser—Cancellation of agreement.

Appeal from judgment of PRENDERGAST, J., noted, vol. 46, p. 744, dismissed with costs.

Full Court.] [Dec. 14, 1910.

IN RE RURAL MUNICIPALITY OF PORTAGE LA PRAIRIE.

Local option—Liquor License Act—Appointment of scrutineers.

Appeal from judgment of MATHERS, C.J., noted, vol. 46, p. 464, allowed with costs, the court holding that the omission from the by-law of any provision for the appointment of scrutineers to attend at the polls and at the summing up of the notes as required by s. 377 of the Municipal Act, was a fatal defect in it, notwithstanding that scrutineers had actually been appointed and acted as such; also that the defect was not covered by the curative provisions in s. 200 of the Act.

Re Bell and Corporation of Elma, 13 O.L.R. 80, followed.

Burbidge, for applicant. *Fullerton* and *McWilliams*, for the municipality.

Full Court.] [Dec. 14, 1910.

KING *v.* QUONG TONG SHING.

Criminal law—Summary trial—Common gaming house—Police magistrate—Jurisdiction—Excessive fine—Amendment.

A police magistrate, though he belongs to the class of officials designated in s. 777 of Crim. Code who may try summarily, with the consent of the accused, a great number of serious indictable offences, can only try summarily without his consent a person charged with the indictable offence of keeping a common gaming house under the powers conferred by ss. 773 and 774 as re-enacted by c. 9 of 8 & 9 Edw. VII. and s. 781 limits

the amount of the fine upon conviction in such a case to $100 including costs.

A conviction imposing a fine exceeding $100 in such a case cannot be amended under s. 1124 of the Code and should be quashed on certiorari, as that section only applies to summary convictions under Part XV. of the Code, notwithstanding that that section was, in the revision of 1906, taken out of the summary convictions part of the Code, where it formerly stood as s. 889, and placed in the part headed "Extraordinary remedies."

Reg. v. *Randolph*, 4 Can. Cr. Cas. 165, followed.

Monkman and *Parker*, for accused. *Whitla*, for the Crown.

Full Court.] IN RE TOWN OF CARMAN. [Dec. 14, 1910.

Liquor License Act—Local option by-law must be complete in itself.

A local option by-law intended to be submitted to the vote of the ratepayers under ss. 61 to 72 inclusive of the Liquor License Act, R.S.M. 1902, c. 101, must, by force of s. 68, referring to proceedings under the Municipal Act, be complete in itself and contain provisions fixing the time and place of the polling and providing for the other matters specified in ss. 376 and 377 of the Municipal Act, including the appointment of agents or scrutineers. Where, therefore, the council passed two by-laws, one simply forbidding the receiving of any money for a license under the Liquor License Act, which by-law was submitted to the vote of the ratepayers before its third reading, and another making the usual and necessary provisions for the taking of the vote on the first as required by the Municipal Act, which by-law was passed through its third reading at one session, the proceedings were held to be fatally defective and incapable of being cured by s. 200 of the Act.

Burbidge, for applicant. *Fullerton*, for town of Carman.

Full Court.] SMITH *v.* THIESEN. [Dec. 14, 1910.

Partnership—Execution against goods of one partner—Interpleader between execution creditor and other partners—Priority as between vendor of land sold on crop payments and execution creditor of purchaser—Growing crops—Bills of Sale Act.

When several persons are tenants in common of a farm and jointly raise crops on it, they are partners in such farming oper-

ations and the crops when harvested are the property of the partnership. Such crops cannot be sold by the sheriff under an execution against one partner. All the sheriff can sell is the share and interest of the execution debtor in such of the chattels of the partnership as are seizable under a fi. fa., and all the purchaser gets is the right to have the accounts of the partnership taken to ascertain what that share or interest is and then to realize it in proceedings to wind up the partnership. *Manitoba Mortgage Co.* v. *Bank of Montreal*, 17 S.C.R. 692, and *Helmore* v. *Smith*, 35 Ch. D., at p. 447, followed.

Christie, one of the claimants in these interpleader proceedings had sold the farm in question, on deferred payments, to the defendant and two other persons who had agreed that all the wheat grown upon it should, when threshed, be delivered at an elevator or in cars in the joint names of vendor and purchasers and that half of the proceeds should be applied, first, in paying the interest due, second, in paying taxes and other charges against the crop and the balance towards the purchase price of the farm, the remaining half to be paid to the purchasers.

Held, that the plaintiff as execution creditor of one of the purchasers, could reap no advantage against Christie from s. 39 of the Bills of Sale and Chattel Mortgage Act, R.S.M. 1902, c. 11, which makes void a security taken upon growing crops and crops to be grown, even if that section would apply in such a case as to which no opinion was expressed. The plaintiff, claiming the proceeds of the crops which were partnership funds, must fail in the issue as against another partner claiming the fund and also as against Christie, as that partner conceded Christie's right to it.

Hoskin, K.C., and *Bowen*, for plaintiff. *A. B. Hudson* and *Locke*, for claimants.

KING'S BENCH.

Prendergast, J.] [Nov. 9, 1910.

THE KING *v.* WONG ROOD.

Criminal law — Summary trial — Police magistrate — Gaming house—Excessive punishment—Amendment of conviction—Habeas corpus.

Held, 1. Since the amendment of ss. 773(*f*) and 774 of Crim. Code by 8 & 9 Edw. VII. c. 9, the case of *King* v. *Lee Guey*, 13

Can. Cr. Cas. 80, is no longer applicable, and a police magistrate has absolute jurisdiction to try summarily a charge of keeping a disorderly house, to wit, a common gaming house, without the consent of the accused.

2. The amount of any fine imposed upon a conviction by a police magistrate in such a case is limited by s. 781 to $100 including costs, and nothing on s. 777 will enable any magistrate to impose a greater fine.

3. When the magistrate, assuming to exercise the powers conferred by s. 777, imposed a fine of $200 in such a case, a judge should not, upon an application for a habeas corpus, exercise the power conferred by s. 1120 of the Code of making an order for the further detention of the accused and directing the magistrate to amend the conviction nor could he amend the conviction himself under s. 1124, which is not applicable to summary trials by police magistrates under Part XVI. of the Code.

Queen v. *Randolph*, 4 Can. Cr. Cas. 168, followed.

Graham, for the Crown. *Hagel*, for prisoner.

Robson, J.] CHODERKER *v.* HARRISON. [Dec. 7, 1910.

Landlord and tenant—Action by sub-tenant for wrongful distress —2 W. & M. Sess. 1, *c.* 5, *s.* 5—*Acceleration of rent—Abandonment of premises—Payment to landlord's clerk—Bailiff's liability.*

Defendants demised the premises in question to one Lesk under a lease in which he covenanted that he would not assign or sublet without leave, also that, if any of the goods and chattels of the lessee should be at any time seized or taken in execution, or in attachment by any creditor of the said lessee, or if the lessee should attempt to abandon said premises or to sell or dispose of his goods and chattels so that there would not in that event be, in the opinion of the lessors, a sufficient distress on the premises for the then accruing rent, then the current month's rent, together with the rent for the succeeding three months next accruing should immediately become due and payable, etc. The lease also provided that the word "lessee" should include the heirs, executors and administrators of the lessee, also his assigns, if he should assign with the consent of the lessors. The plaintiff bought the stock in trade on the premises from Lesk and took possession, thereafter paying the rent to the defendants, but there was no consent to an assignment by Lesk.

Held, 1. The plaintiff was not the "lessee" within the meaning of the covenant in the lease and the defendants could not justify a distress for three months' accelerated rent under the covenant above set forth by reason of any seizure of the goods and chattels of the plaintiff on the premises or any dealing by the plaintiff with such goods.

2. It could not be said that Lesk, the lessee, had, by selling out and turning over possession to the plaintiff, attempted to abandon the premises. *Monson* v. *Boehm*, 26 Ch. D., at p. 405, and 1 A. & E. Ency. L. & P. 4, followed.

3. Sec. 5, of 2 W. & M. Sess. 1, c. 5, authorizes the recovery of double the value of goods and chattels illegally distrained and sold in an action by the owner of the goods, although he may not be the tenant. Bell on Landlord and Tenant, p. 345, followed.

4. The defendant Willis, who acted as the bailiff of the defendant Harrison in making the illegal distress and sale, was equally liable with them under the statute quoted. *Hope* v. *White*, 17 U.C.C.P. 52, followed.

Finklestein and *Morrisey*, for plaintiff. *Wright* and *Tench*, for defendants.

Macdonald, J.] [Dec. 14, 1910.

SKULAK *v.* CANADIAN NORTHERN RY. CO.

Railway—Engine moving backwards in yard without man in front to warn pedestrians—Negligence—Contributory negligence—Use of bell and whistle—Trespasser, right of action for injury to.

Under s. 276 of the Railway Act, R.S.C. 1906, c. 37, as amended by 9 & 10 Edw. VII. c. 50, s. 7, it is only when a train is passing or about to pass over or along a highway that the railway company is required, in case the train is not headed by an engine moving forward in the ordinary manner, to station a man on that part of the train, or of the tender if that is in front, which is then foremost, to warn persons standing on or crossing or about to cross the track; and s. 274 of the Act, requiring the use of the bell and whistle, should be interpreted as limited in the same way.

The plaintiff's husband, an employee of the defendant company, while proceeding through the railway yards on business of his own, stepped off the track on which he was walking to avoid an approaching express train, and stepped on to another track when he was struck and killed, at a point which was not near any

highway crossing, by a yard engine moving reversely without any person stationed on the part of the tender which was foremost. There was a path between the two tracks on which the deceased might have walked safely.

Held (without a finding on the evidence as to whether or not the bell of the yard engine had been rung), that the defendants were not liable, as they had not been guilty of any negligence and the deceased was guilty of contributory negligence in going upon the other track.

Semble, the deceased had no right to be where he was at the time of the accident and was therefore a trespasser: *Dean* v. *Clayton*, 7 Taunt. 489, and *Jordin* v. *Crump*, 8 M. & W. 782; and no action was maintainable without evidence of intention to injure.

Howell and *H. V. Hudson*, for plaintiff. *Clark*, K.C., for defendants.

Robson, J.] NOBLE *v.* CAMPBELL. [Dec. 14, 1910.

Mortgage—Purchaser of land subject to mortgage on implied covenant to indemnify vendor—Foreclosure, effect on liability of mortgagor under covenant—Parties to action.

The plaintiff sold certain land to the defendant subject to two mortgages under the Real Property Act, so that defendant was under an implied covenant to indemnify the plaintiff against the mortgages. The mortgagees subsequently recovered judgment against the plaintiff for the amount due on the mortgages, and afterwards foreclosed them and obtained certificate of title to the property. In this action by plaintiff to enforce the defendant's implied covenant of indemnity defendant raised the contention that the plaintiff was released from his covenant by this action of the mortgagees in obtaining the foreclosure.

Held, that this question could not be decided in the absence of the mortgagees, and that unless plaintiff would amend, pursuant to leave, adding the mortgagees as parties defendant, the action should be dismissed with costs.

Haggart, K.C., and *Sullivan*, for plaintiff. *Hoskin*, K.C., and *Huggard*, for defendant.

Macdonald, J.] [Dec. 14, 1910.

TOWN OF SELKIRK *v.* SELKIRK ELECTRIC LIGHT CO.

Municipality—Use of streets by electric light company after expiration of time limited—Injunction—Order to remove poles and wires—Estoppel.

The defendant company had acquired the rights and business of a company which had in 1891 secured the right to erect poles and wires in the streets of the town of Selkirk and to carry on the business of supplying electric light and power in the town for a period of ten years. After the expiration of that period, and until the year 1909, the defendant company and its predecessors in title continued the business and erected from time to time new poles and wires in the streets without procuring any extension of the franchise, but also without any action being taken by the town to prevent the carrying on of the business.

Held, 1. The town was not estopped from passing a by-law in 1909 revoking and terminating the rights and privileges previously granted and then exercised by the defendant company and requiring the immediate removal of all their poles and wires from the streets, and was entitled to a declaration that the defendant company had no right any longer to maintain its system, an injunction to restrain it from maintaining the same or erecting poles or wires or transmitting electricity within the town, and an order requiring the company to remove their poles and equipment from the streets of the town.

2. The Attorney-General was not a necessary party to the action.

Saugeen v. *Church Society*, 6 Gr. 538, and *Fenelon* v. *Victoria Ry. Co.*, 29 Gr. 4, followed.

Heap and *Stratton*, for plaintiffs. *Wilson*, K.C., and *Hamilton*, for defendants.

Mathers, C.J.] [Dec. 23, 1910.

CLARK *v.* WATERLOO MANUFACTURING CO.

Sale of goods—Sale of Goods Act—Warranty—Implied condition.

Action for breach of warranty of threshing machinery consisting of an engine, separator and several other articles sold by defendants under an agreement in writing containing the following among other clauses:—

"The said machinery is warranted to be made of good material, to be durable, and, with good care, to do good work if properly

operated by competent persons. This warranty does not apply to second-hand machinery. There are no other warranties, guarantees or agreements other than those contained herein."

Held, 1. As there was no complaint respecting anything but the separator, which was admitted to be "second-hand," there was no warranty under the agreement.

2. The agreement and the plaintiff's course is suing only for a breach of warranty excluded the operation of s. 16 of the Sale of Goods Act, R.S.M. 1902, c. 152, which would otherwise import "an implied condition that the goods shall be reasonably fit" for the particular purpose for which they are required.

3. *Quære*, whether the agreement did not in any case exclude the statutory implied condition.

Sawyer-Massey v. *Ritchie*, 13 W.L.R. 89, reversed in the Supreme Court, not yet reported, referred to.

Curran, K.C., for plaintiff. *G. F. Taylor*, for defendants.

Province of British Columbia.

SUPREME COURT.

Full Court.] GOODACRE & SONS *v.* SIMPSON. [Dec. 21, 1910.

Statute of Limitations—Payment on account—Appropriation of fund—Promise sufficient to take debt out of statute.

A debt collector having accounts placed in his hands by both plaintiffs and defendant for collection, applied to the defendant for payment of his account, which was statute-barred. Defendant stated that plaintiffs would never press him for payment, but on the collector insisting, defendant instructed him to hand over to plaintiffs some of the money collected for defendant. The collector accordingly paid in $11.65.

Held, affirming the judgment of LAMPMAN, Co. J., at the trial, that from the instructions of defendant to the collector to pay to plaintiffs some of the moneys collected for him (defendant) could be inferred a promise to pay sufficient to take the debt out of the statute, and was not an appropriation of a particular fund.

H. E. B. Robertson, for defendant, appellant. *Aikman*, for plaintiffs, respondents.

Book Reviews.

Lawyers' Reports Annotated. New Series. Lawyers' Co-operative Society, Rochester, N.Y., U.S.A. 1910.

The 28th volume has been received, together with an index-digest bringing all the cases up to date. The excellence of this series is recognized both in United States and in Canada. We cannot do without United States reports and the selection of cases by the Editors of this series saves the profession the enormous, and one might say the impossible, labour of picking out authorities from the multitudinous reports in the various States of the Union. We cannot too highly recommend these volumes.

Flotsam and Jetsam.

The *British Medical Journal* had a good story last month of jurors and medical evidence. A leading citizen was had up for assault and battery. One of the witnesses was a local doctor, whom the prosecuting attorney proceeded to worry, suggesting that he was prejudiced in favour of the defendant, and had, therefore, wilfully distorted his evidence in his favour. The doctor denied this, and went on to say that the defendant was suffering from "phalacrosis." The word caused a sensation in the Court. Asked to define the disease, the doctor described it as "a sort of chronic disease of an inflammatory nature which affects certain cranial tissues." Asked if it affected the mind, the doctor said he was not posing as an expert, but he had known some persons who were suffering from the disease become raving maniacs, others merely foolish, some shewed destructive and pugilistic tendencies, while many others had suffered for years and had never shewn any mental abnormalities. He refused to say anything further, and the jury promptly acquitted the "leading citizen," because as the foreman explained, "the doctor said there was something the matter with his head." When the case was over the prosecutor sought enlightenment as to the mysterious disease, and found that "phalacrosis" meant "baldness"!—*Law Notes.*

Canada Law Journal.

VOL. XLVII. FEBRUARY 15. No. 4.

A CONSTITUTIONAL KING.

All loyal subjects of King George the Fifth of England, in all parts of the vast Empire over which he rules, are glad that with the courage of conscious innocence he has dragged into the fullest light a pestiferous slander and that the light has shewn its falsity.

We may not be interested in the Divine right of Kings, but we are all interested in this, that a worthy descendant of the greatest and best and purest of all sovereigns of all time now sits on the throne of Victoria the Good.

The King has by his action in this matter not only put an end to a vile slander, but he has also vindicated his right to be called a constitutional ruler, in that he stepped down from his throne and placed his kingly reputation as well as his personal honour in the hands of a jury of his people to be adjudicated upon by them in one of the ordinary courts of the land. The result has been what we all expected; and the slimy slander has shrivelled and disappeared in the fire of judicial investigation.

As to the contemptible reptile brood that hatched it, one of them is now spending a term, all too short, in prison, whilst his fellow conspirator, who, living outside its jurisdiction, could not be reached by an English court, has been disowned by his parents and stands disgraced in a country which despises him.

DOMINION LEGISLATION.

The third session of the eleventh Parliament of Canada commenced on November 17th, and will probably continue for another three months. Although none of the bills introduced have yet become law it will be interesting to refer, in more or less detail, to the more important of those which have been brought before Parliament to date.

As it is frequently the case, the majority of members who

have introduced legislation are lawyers; this is natural and proper. Further, one half of the bills introduced are fathered by lawyers. In the following pages we have, as a rule, mentioned the various members of the legal profession by whom the bills were introduced, but being usually on the side of the House farthest removed from the Government benches, their bills are not likely to become Acts of Parliament. It is to be regretted, that, no matter what party is in power, an opposition member has but little chance of impressing upon the Government his views respecting legislation required.

As with the Municipal Act in the province of Ontario, and the Municipal Code in the province of Quebec, the most fertile ground for improvement in Federal legislation is supposed to be the Railway Act. Among the amendments already proposed is one by Mr. Lancaster which requires a coroner to hold an inquest whenever a person is killed or receives injuries causing death on the property of, or by, or in a train of a railway company. It is alleged that, in some cases, coroners are not unduly anxious to cause trouble to the company. The labour members of Parliament would make more stringent the law respecting the payment of wages, and would not allow the company to withhold any part thereof for any reason whatsoever. One of last year's bills, of Mr. Sharpe (Ontario), which is again introduced would compel the company to make annual returns of money held and unpaid for one year, whether for money orders, cheques or transfers by telegraph, and requires the company to transfer the amount to the Minister of Finance. An amendment by Mr. Meighen demands that particulars respecting cattle guards in use be approved by the Railway Commission, and also is concerned with damages caused to or by cattle on a railway. Discrimination in the rates charged for suburban or commutation passengers' tickets is the reason for the bill introduced by Mr. Macdonell, somewhat on the line of the similar bill he introduced last year.

Free trade in railway charters may be said to be the text on which is based a bill introduced in the Senate to provide for the

incorporation of railway companies, which, by the way, is identical with a bill introduced by the same Senator last session. It provides that seven or more persons may, by agreement in writing, form themselves into an association for the purpose of constructing and operating a railway, and may obtain letters patent for such purpose. Notice of the agreement is to be given, similarly to the present law. Surveys may be made, and plans and estimates filed with the Board of Railway Commissioners, and if the Board is satisfied it may issue a certificate recommending the incorporation. Amalgamation and pooling with competing companies are forbidden. The tendency in recent years (as indicated in the Railway Committee of the House of Commons) is towards granting charters to those persons or companies who, it is believed, really intend to construct the railway, notwithstanding there may be an existing charter for a line which is almost parallel, but which has not been constructed.

The amendment to the Interest Act introduced last session by Mr. Miller was not then proceeded with. It provides that whenever any principal, interest or other money secured by mortgage is not paid when due, then if the person liable to pay or entitled to redeem gives the mortgagee one month's notice, in writing, of his intention to pay the money, and at the expiration of the time mentioned in the notice pays or tenders the money and interest to that time, or, at any time after it is so due pays or tenders to the mortgagee the money and interest to the time of payment or tender, and in addition one month's further interest in lieu of notice, no further interest shall be recoverable.

The Companies Act is not overlooked. Mr. Sharpe (Ontario) desires greater detail to be given in the directors' statement for the annual meeting, and very elaborate details must be given in the annual summary. The secretary of a company will no longer occupy a sinecure.

The Co-operative Credit Societies Bill introduced last session by Mr. Monk, and dropped, is again presented this year without any change. There seems to be a long-felt want for such a law in the province of Quebec, whereas delegations of retail mer-

chants are beginning to go to Ottawa in opposition to the bill. "Amongst ye be it, blind harpers!" Another bill, somewhat on the same line, entitled "An Act respecting Co-operation," which appeared last year, is again introduced; this time by Mr. Martin (Regina). The Government has manifested some interest in both these bills.

Among other commercial legislation is a bill of Mr. Carvell's, to fix the weight of a barrel of potatoes at 160 lbs. The want of such legislation has meant a loss of thousands of dollars to the farmers. A Government measure dealing with white phosphorus is for the stated purpose of minimizing the danger caused by white phosphorus in the manufacture of matches, and prohibits the importation of matches so made. Another Government measure prohibits the importation, manufacture, sale and use of opium, cocaine and morphine for other than scientific or medicinal purposes. The bill is introduced by the Minister of Labour, who conducted extensive investigations into the opium traffic in British Columbia the year before last. Exhaustive search may be made for the drugs, which may be seized, the burden of proof is put on the offender, and there are heavy penalties for offences against the Act. Offences may be tried before any judge of sessions, recorder, police or stipendiary magistrate, or two justices of the peace, and no conviction, judgment or order may be removed by certiorari into any court of record.

The bill respecting pure foods, introduced last session by Major Currie, is reintroduced this year. Very strict provisions are proposed. The bill applies to every article of food or drug which is packed, bottled, tinned or stored, or offered for sale, or prepared for meals. Complete provision is made for Government inspection, and there are heavy penalties for infractions of the law. The plan of the legislation seems to have been well thought out, and is worthy of careful consideration by Parliament.

Mr. Lewis seeks to prohibit the sale of poisons except on the authority of a medical certificate or prescription, and requires

all poisons to be in blue glass, three cornered or square bottles with rough corners, and the long list of poisons (most of which, by the way, can be found in the Ontario Pharmacy Act) has been amended.

The medical profession are seeking amendments to The Canada Medical Act. The subject has been on the tapis for some time, Dr. Roddick having introduced a bill several years ago looking to the unification of the provincial qualifications. The present bill openly recognizes homœopathic practitioners; they were entitled to this long ago. Under the present law rights and privileges are secured to "practitioners who now form a recognized distinct school in the practice of medicine." These words are now omitted, and homœopaths only are mentioned. The practical effect will be to exclude osteopaths.

The question having arisen as to whether the Exchequer Court has exclusive original jurisdiction to hear claims arising under provincial laws, an amendment is proposed by Mr. Barnard to make this clear.

The Daylight Saving Bill is again to the fore. We quoted it in full a year ago. The only change Mr. Lewis now proposes is to authorize municipalities to determine by by-law what time shall be the local time in such municipality. Last session the bill went to a committee, and much evidence pro and con was heard, but the bill was not pressed. The idea seems to be gradually gaining ground, and many employers of labour are now acting upon the principle.

The Dominion Elections Act is always a fruitful field for change. Mr. Macdonell has reintroduced his bill of last year regarding the candidates' deposit, and to make polling day a public holiday. The bill also extends the hours of polling. Another bill by Mr. Sharpe (Ontario) requires the deputy returning officer to exclude from the polling booth all persons not entitled to be present; there appears to be no such provision at present. Mr. Conmee, who is recognized as an authority on elections, reintroduced the bill, which we referred to last year, to enable a railway employee to vote at any divisional point on his railway. The

practical difficulties in the way of such legislation are too great to make it advisable that the bill should pass.

Mr. Lewis has reintroduced his bill respecting wireless telegraphy on ships, which requires sea-going passenger ships over 400 tons, and freight ships over 1200 tons, to be equipped with wireless apparatus. The same member has also reintroduced his bill requiring ships in inland waters to be marked with a discs, and with lines indicating the position of each deck. The load lines too must not be submerged.

It is an old complaint that "tipping" is an outrage, and largely on the increase, but it has not been taken seriously until now, when a bill has been introduced by Mr. Lewis entitled "An Act to prevent the giving and taking of Gratuities," which, by the way, only applies to the form of gift commonly known as a gratuity or tip. By this bill if any male employee corruptly accepts or attempts to obtain any gift as an inducement or reward for shewing favour to any person in relation to his employer's business, and any person corruptly giving any such gift, is guilty of an offence. It will be noticed that it is confined to *male* employees, so that the fair sex is still able to obtain the desired douceur. It is improbable that such a bill will pass, but even if such were the law we fear it would be no more effective than the common notice, "Please do not tip the waiter."

Mr. Barnard seeks to prevent a gill net license being granted unless the grantee is a British subject residing in the province and "is capable of fulfilling the requirements as to stature and chest measurement provided by the regulations governing the admission of volunteers to the Naval Volunteer Force." The restriction, so peculiarly worded, is obviously aimed at the Japanese.

The inspection of railway locomotive steam boilers is desired by a bill standing in the name of Mr. Pardee. The idea has much to recommend it.

The Commission of Conservation is the body responsible for a bill introduced by Mr. Monk respecting water-powers. It is desired to prevent any water-power, easement, servitude,

right of user or usufruct upon or about any river or water-course controlled by the Crown being alienated, except by a lease for a period not to exceed fifty years. Any alienation must be recommended by the Commission, and before doing so full information must be obtained. Every transfer of a lease must be approved by the Governor in Council. Other extensive restrictions are provided. If the principle of the bill is adopted many changes will undoubtedly be made in its passage through Parliament.

The Juvenile Delinquents Act is amended to provide for the case of children other than Protestants and Roman Catholics. The intention is to include the Jews.

The numerous accidents resulting from fools with guns has suggested to Mr. Lewis an amendment to the Criminal Code, by which every one shall be guilty of an indictable offence and liable to two years' imprisonment who injures by shooting any person, although the person charged believed the object he was aiming at was a deer, moose, or other animal.

The "undesirable immigrant" has not escaped Mr. Lewis' eagle eye. Having been unsuccessful last year, he is again trying to prevent bowie knives and revolvers being introduced by this class of immigrants, and deportation is provided for. He also thinks it advisable that a permit should be granted by the chief of police or a magistrate before a revolver may be purchased, and makes it a criminal offence to sell one to a person who is intoxicated, or of unsound mind, or under the age of eighteen. He would also make it unpleasant for any person wounding another with a revolver, knife, stiletto or razor. Italians and coloured people will please take notice.

The Immigration Act which came into force last year is still in a transition stage, and must probably remain so for a while. The influx of immigration has caused unforeseen difficulties, and judicial decisions also have necessitated government amendments this session.

The most important measure thus far is undoubtedly the Bank Act. Every ten years provision must be made for a

renewal of the charters and corporate powers of all banks, which only exist for the period fixed by statute. On the first day of July in this year all existing charters expire. The necessity for their renewal gives an opportunity to consolidate the Act and make such amendments as have been found necessary. The more important of the changes will now be mentioned:

Provision is made for an external audit of the bank's affairs by the shareholders if they, or a small minority of them, desire it. Under the present system there is an internal audit by which the directors and management keep in touch with the bank's business. The new audit proposed is for the information of the shareholders, the real owners of the bank. In England the large joint stock banks have, by statute, a similar audit.

The bill makes changes with respect to the organization of banks. It is now made clear to subscribers for stock that they are undertaking a double liability. The necessary amount subscribed must also be paid in cash by the subscribers before the organization can take place. If, when a charter has been obtained but the provisional directors have failed to get the bank organized within the time limited by the Act, no part of the funds collected shall be disbursed for commissions or salaries among the promotors or provisional directors unless the subscribers themselves consent thereto. Some existing banks still have fifty dollar shares; these may now be converted into one hundred dollar shares without the necessity of obtaining a special Act.

No material changes have been made with regard to the business and powers of banks; only some slight modifications appear. A bank may lend money to a receiver duly authorized to borrow, and the lending bank may take security in such form and upon such property and assets as the court may allow. By a recent decision it was held that planks and boards were not included under the expression "products of the forest." It had been generally believed that they were covered by the Act of 1890. The expression is now defined to include timber and lumber of all kinds.

The administration of the law with regard to penalties and punishments for making false and deceptive statements in a return or document respecting the affairs of the bank has evidently been the reason for changes in this respect by the new law. Every president, vice-president, director, general manager and auditor is bound to make enquiries with regard to the accuracy of any account, statement, return, report, or document which these persons may prepare, sign or concur in. They must first obtain information which is reasonably adequate and sufficient to establish the facts, and they must believe that the account, return or report is true and correct before placing it before the shareholders or the Minister of Finance. The old form "to the best of my knowledge and belief" will no longer be accepted, but every reasonable means must be taken to ascertain the correctness of the document. The Bank of British North America, which received its charter directly from the Crown, is now brought under the provision provided for civil liabilities and penalties for making false and deceptive returns. This provision is not only reasonable but it is justified under the wording of the supplemental charter granted to that bank in 1870 by the Imperial authorities.

Section 156, which prescribes penalties for the use, without statutory authority, of expressions indicating that a banking business is being carried on, has been recast.

Changes of nomenclature now in use by banks have caused the expression "general manager" to replace "manager," the latter word only being used when the reference is to the officer in charge of a branch. The expression "cashier" has disappeared. The expression "chief office" now replaces the expression "head office," "chief office" and "chief place of business" which appear in miscellaneous fashion throughout the existing Act.

Many of the amendments will undoubtedly give rise to criticism and suggestions if for no other reason than that the banks were not consulted with regard to the amendments. To take an illustration we would refer to section 54, respecting the statement to be laid before the annual meeting. The amendment requires

that "the statement shall be signed on behalf of the Board by the general manager and three, at least, of the directors." At first blush this seems reasonable, but in practice where will be found three directors who can possibly vouch for "a clear and full statement of the affairs of the bank, exhibiting on the one part the liabilities of the bank, and on the other part the assets and resources thereof." If the general manager is dishonest, and the innocent director signs as heretofore (being misled by the statements of the manager upon subjects with which he, the director, cannot possibly be familiar) the director will, if the statement contains any false or deceptive statement, be held to have wilfully made such false or deceptive statement, and shall be responsible for all damages sustained by any person in consequence thereof, even although the signature of such director appears or is stated or intended to express consent, approval or concurrence merely according to the best of his knowledge and belief.

The provisions respecting audit proposed by the new Bank Act are not generally considered satisfactory. The alternative propositions seem to be: (*a*) the shareholders' audit, above-mentioned; (*b*) Government inspection; (*c*) an inspection by an inspector appointed by the Bankers' Association. A bill by a private member proposes that the Minister of Finance may, at least once in every two years, have an inspection made of any bank by an auditor or inspector appointed by him for that purpose. This method is objected to by the bankers on the ground that whenever such an inspection is made it thereby injures the reputation and standing of the bank inspected. The Bankers' Association would undoubtedly prefer to be authorized to appoint an inspector who might examine whenever the association thought it desirable. The association would take the responsibility, and no reflection need be cast upon any bank, and if upon such inspection irregularities were found, the banks themselves would, in most cases, be able to call a halt, and, if necessary, force gradual liquidation, and thereby protect better the interests of the shareholders and creditors. The recent suspension of a

bank—now in every one's mind—has suggested that, instead of the inspector of a bank being under the authority, in any way, of the general manager, he should report to the directors instead of to the manager (which is now done in the case of at least one bank in Ontario), but, having once been appointed, an inspector might only be dismissed by a vote of two-thirds of the directors. This would make his position stronger and tend to insure a more reliable and searching report. That more stringent legislative provisions and better protection to the public are required, few will question, in view of the three recent lamentable failures in Canadian banking institutions.

A Government measure of considerable importance is entitled "An Act to regulate the manufacture, storage and importation of Explosives." The title sufficiently indicates the purpose. The bill will be made to apply to all factories and explosives other than those the property of the Crown or the Government. The British Act has been largely followed. There are strict provisions as to inspection of explosives and the factories where they are made, as well as of places where they are stored. The many serious accidents in recent years caused by the unauthorized or careless use of explosive materials is more than sufficient justification for this legislation, which is under the control of the Minister of Mines, who may direct inquiries to be made into the cause of explosions.

Legislation affecting particular trades is not common, but an instance this session is a bill to compel railway companies to give better protection and accommodation to carpenters employed on the railway.

Some bills of commercial interest should be noticed. One by Mr. Lewis, based on the United States law, would limit the time within which food may be sold after being in cold storage. It may be difficult to determine this time, and the fitness of an article for food must depend largely upon the efficiency of the cold storage plant. The other bill referred to requires that when flour or meal is sold or offered for sale by the bag there shall be plainly marked or stamped on the bag the name of the manu-

facturer or packer, and his address, and the weight of the contents and the tare of the bag.

A consolidation of the Manitoba Grain Act and certain portions of the Inspection and Sale Act is being made by the Government. This is a matter of considerable importance to the North-West.

The Government is wisely acquiring and retaining for Dominion public parks greater areas than were formerly included in the reserves set apart by the Forest Reserves Act and the Rocky Mountains Park Act. The purposes of forest reserves and forest parks are identical in many respects, while they differ in others. A forest reserve is withdrawn from occupation, whereas a forest park is primarily intended for the purposes of pleasure. It has been found necessary to change the boundaries of the existing reserves, and also to include a forest reserve covering the eastern slope of the Rocky Mountains. Power is also taken to expropriate property of private owners within an area desired for a park.

Much additional legislation is foreshadowed, but there is sufficient already in evidence to keep the Federal Parliament very busy for some months to come, apart from the time expected to be occupied in debating the reciprocity agreement, in discussing the report of the Printing Bureau investigation, and in the consideration of many other matters which loom up largely in the political horizon.

JUDGES AND ROYAL COMMISSIONS.

The undesirability of appointing judges to preside over Royal Commissions and do work outside the range of their proper judicial duties has, as we gather from our contemporary, *The Law Notes*, again come up for discussion in England. It would appear that Lord Justice Vaughan Williams, one of the Lord Justices of Appeal, was one of three Commissioners to report on matters connected with the Welsh Church. He seems to have disagreed with the other Commissioners, for they complained

of him as follows:—"We regret to be compelled to call attention to one difficulty which has made our task a most unenviable one. We refer to the behaviour of the chairman. He has throughout acted in an arbitrary and overbearing manner both in his personal relation with individuals of the Commission and in his conduct as chairman." Whether there was any cause for this complaint or not is immaterial, but such language shews that it is extremely undesirable that any one holding so high a position as does Lord Justice Vaughan Williams should be placed in such a position as to allow him to be open to such a charge. We have had similar experiences in this country and the dignity of the Bench—a most important asset in any country—has been thereby lowered. Moreover there is no need for it. There are plenty of men at the Bar as capable of doing efficient work on Commissions as any judge on the Bench. A criticism which would be hurtful so far as the Bench is concerned would only be a helpful advertisement to a man at the Bar. It is most undesirable, and it is so admitted by everyone, that a judge should be taken away from his court duties to do extra judicial work. It is only the exigencies of party politics that demand this objectionable practice.

THE CREATION OF PEERS.

The proposed exercise of the prerogative of the creation of peers in the event of a deadlock between the Houses of Parliament will render it of interest to recall the principal cases in which there has been recourse to this method of bringing the Houses into harmony. Towards the close of the reign of Queen Anne the creation of a batch of twelve peers simultaneously was advised in order to secure the assent of the Lords to the Peace of Utrecht. This was the first case in which the prerogative of the Crown had been used in the House of Lords to secure a majority for the Government. In Ireland, in 1776, eighteen Irish peers were created in a single day. The peerages were known to be the result of an engagement to support the

Government by their votes in the House of Lords. Before the second reading of the Reform Bill of 1832 no fewer than sixteen new peers had been created, to correct in some measure the notorious disproportion between the two parties in the House of Lords, and King William IV. gave his consent in writing to Earl Grey for the creation of such a number of peers as would be sufficient to ensure the passing of that measure, but his personal influence with the peers was successfully exerted to induce them to desist from further opposition.

Lord Brougham, who was Lord Chancellor in Earl Grey's Reform Cabinet, a generation later, in 1863, placed on record his feelings and his deep anxiety as a constitutional lawyer in reference to this step, in which he was, of course, participating to the full with the Prime Minister. His reflections are of singular interest, but, in reading his apprehensions of the consequences of the creation of peers to carry the Reform Bill, we must remember that the idea of placing a bar, by statute or otherwise, to the veto of the House of Lords on general legislation was not then even the subject of contemplation, however academic. "In recent times," wrote Lord Brougham in 1863, "the Government of which I formed a part, backed by a large majority of the Commons and the people out of doors, carried the Reform Bill through the Lords by the power which His late Majesty had conferred upon us of an unlimited creation of peers at any stage of the measure. . . . Nothing could be more thoughtless than the view which they took of this important question. They never reflected for a moment upon the chance of their soon differing with Lord Grey and myself—a thing which, however, speedily happened; never considered what must be the inevitable consequence of a difference between ourselves and the Commons; never took the trouble to ask what must happen if the peers thus become our partisans should be found at variance with King, Lords and people; never stopped to foresee that, in order to defeat our oligarchy, a new and still larger creation must be required": (Brougham's British Constitution, pp. 268-269).—*Law Times.*

REVIEW OF CURRENT ENGLISH CASES.

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CONFLICT OF LAWS—CONTRACT TO ISSUE DEBENTURES—FLOATING CHARGE ON FOREIGN LAND—CLOG ON REDEMPTION—CHARTERED COMPANY—BREACH OF CHARTER—ULTRA VIRES.

British South Africa Co. v. *De Beers Con. Mines* (1910) 2 Ch. 502. In this case the Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ.) have affirmed the judgment of Eady, J. (1910) 1 Ch. 354 (noted ante, vol. 46, p. 303). The facts were that the defendant company had advanced to the plaintiff, a South African company, a large sum of money on the security of debentures which were a floating charge on the plaintiffs' property, and had stipulated for, and the plaintiffs had granted them, an exclusive right to work certain diamondiferous ground belonging to the plaintiffs as part of the security for the loan. The loan had been paid off, but the defendant company claimed to be still entitled to an exclusive right to work the diamondiferous ground. The plaintiffs claimed a declaration that the agreement was a clog on redemption and was void, or at all events was now at an end. The defendants contended that the "clog doctrine" did not apply to lands in South Africa, and that the case must be governed by the law of the situs of the land. For the plaintiffs it was argued that the clause was void not only on the ground of its being a clog on redemption, but also on the ground that it was ultra vires, because the plaintiffs were prohibited by their charter from granting a monopoly; that the contract was made in England and was governed by English law. The Court of Appeal upheld the plaintiffs' contention that it was an English contract and was therefore governed by the English law, and that the agreement constituted a clog on redemption, notwithstanding that the land affected was in a foreign country, where the doctrine did not prevail. It, therefore, became unnecessary to consider the question of ultra vires.

LANDLORD AND TENANT—COVENANT NOT TO ASSIGN WITHOUT LEAVE —CONSENT NOT TO BE WITHHELD FROM "A RESPECTABLE AND RESPONSIBLE PERSON"—LIMITED COMPANY A "PERSON."

In *Wilmott* v. *London Road Car Co.* (1910) 2 Ch. 525, it may be remembered that Neville, J., held (1910) 1 Ch. 754 (noted ante, vol. 46, p. 453) that a limited company could not be "a

respectable and responsible person" within the meaning of a covenant by a lessee not to assign without leave, the lessors agreeing not to withhold consent to an assignment to "a respectable and responsible person." The Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) have now held that he was wrong, and that a limited company is a legal "person" and may be both "respectable and responsible."

WILL—CONSTRUCTION—DEVISE IN STRICT SETTLEMENT—TRUST FOR ACCUMULATION FOR PERSON WHO SHOULD BECOME ENTITLED TO REAL ESTATE—DISENTAILING DEED EXECUTED BEFORE EXPIRATION OF PERIOD FIXED FOR ACCUMULATION—RIGHT TO ACCUMULATION.

In re Trevanion, Trevanion v. *Lennox* (1910) 2 Ch. 538. In this case Joyce, J., was called on to construe the will of a testator who had devised his real estate to a trustee for his wife for life and after her death for his sons successively in tail male with remainders over, and he also directed that for a certain period the trustees should accumulate the rents and profits and hold the accumulations for the person who at the expiration of the said period should under the will be entitled to the possession and enjoyment of the real estate. The widow died, and before the period for accumulation had expired, the first tenant in tail executed a disentailing deed whereby he became absolutely entitled in fee simple, and the question was whether he was entitled to the accumulations or whether he must wait till the end of the period fixed for accumulation, and the learned judge held that the effect of the disentailing deed being to give him an absolute title to the land there could consequently be no other person who could become entitled under the will except himself, his heirs, or assigns, and, therefore, that he was entitled to the immediate payment of the accumulations, and that the trust for accumulation could no longer be enforced and he was entitled to be let into possession.

PRACTICE—ORIGINATING SUMMONS—PERSON CLAIMING UNDER RESULTING TRUST, WHERE DECLARED TRUST VOID FOR ILLEGALITY —RULE 765(A)—(ONT. RULE 938(A)).

Re Amalgamated Society of Railway Servants (1910) 2 Ch. 547. This was an application by originating summons by settlors to enforce a resulting trust on the ground that the trust they had declared by an instrument in writing was void for illegality.

The defendants took the preliminary objection that under Rule 765(*a*), (see Ont. Rule 938(*a*)), a settlor claiming by way of resulting trust in consequence of the illegality of the trust declared by him, is not a cestui que trust under the "trust of that instrument" and, therefore, not within the rule, and Eady, J., gave effect to the objection, and held that an action was necessary.

WILL—TRUST FOR ACCUMULATION TO MEET LIABILITIES UNDER LEASE—ACCUMULATION ACT, 1800 (THELLUSON ACT) (39-40 GEO. III. C. 98), SS. 1, 2—(10 EDW. VII. C. 46, SS. 2, 3 (ONT.)).

In re Hurlbatt, Hurlbatt v. *Hurlbatt* (1910) 2 Ch. 553. In this case the validity of a trust for accumulations beyond the statutory period was in question. A testatrix had devised leaseholds to trustees upon trust that they should yearly for the residue of the terms of years for which she held the property accumulate one-fourth of the rents and profits, which she directed to be invested, and that all dividends and income arising from such investments should be added thereto by way of accumulation, and that the same and all accumulations should be held as a reserve fund by the trustees to indemnify them against all claims for dilapidations which might arise in respect of the leaseholds, and, subject to such indemnity and claims, in trust for the equal benefit of her nephew and nieces. The testatrix died in 1879, and the 21 years allowed for accumulation by the Thellusson Act terminated in 1900. The last of the leases did not expire till 1909. One-fourth of the rents had been accumulated and the dilipidations had been paid for thereout. Warrington, J., following *Varlo* v. *Faden* (1859) 27 Beav. 255; 1 De J. F. & J. 211, held that the trust to accumulate until the end of the terms was valid, the trust being in the nature of a provision for payment of debts and therefore within the exception of s. 2 (s. 3 of Ontario Act).

SALE OF GOODS—IMPLIED WARRANTY OF FITNESS OF GOODS SOLD—PATENT OR TRADE NAME—SALE OF GOODS ACT, 1893 (56-57 VICT. C. 71), S. 14.

Bristol Tramways v. *Fiat Motors* (1910) 2 K.B. 831. By a contract in writing the plaintiffs bought from the defendants one Fiat omnibus which they had inspected and six Fiat omnibus chassis. The vehicles when delivered proved to be unfit to per-

form the work required of them. Lawrence, J., who tried the action, found as facts, that the vehicles in question had not a distinctive trade name, that the buyers relied on the defendants judgment; and that the vehicles were inadequate, and he gave judgment for the plaintiff, which the Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ.) affirmed, their Lordships holding that under s. 14 of the Sale of Goods Act there was an implied warranty that the goods were reasonably fit for the purpose they were required—and that the defendants were not protected from liability by the proviso relating to the purchase of goods known by a patent, or trade name, as to which there is no warranty except that they are in fact of the character contracted for.

SHIP — CHARTER-PARTY — OPTION TO CANCEL CHARTER-PARTY IF VESSEL DOES NOT ARRIVE BY FIXED DATE—TIME FOR EXERCISING OPTION.

Moel Tryvam Ship Co. v. *Andrew* (1910) 2 K.B. 844. In this case the defendants chartered a ship from the plaintiffs which was to go with all convenient speed to Newcastle, N.S.W., and there load a cargo of coal which the defendants bound themselves to ship. The defendants had an option, however, to cancel the charter-party if the ship had not arrived at Newcastle by December 15, 1907. The ship did not in fact arrive at Newcastle until 15 June, 1908. As soon as 15 December, 1907, had passed, the plaintiffs called on the defendants to exercise their option, but they refused to do so; but on the arrival of the ship in June, 1908, they then exercised their option and cancelled the charter-party. The plaintiff sued for a breach of contract, but Bray, J., who tried the action held that the plaintiffs were bound to send the ship to Newcastle notwithstanding it could not be got there by the date named, and that the defendants could not be called on to exercise their option until the ship was there. The action was therefore dismissed, and the Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ.) affirmed the decision.

SALE OF GOODS — DELIVERY IN INSTALMENTS — ACCEPTANCE OF FIRST INSTALMENT—REJECTION OF SUBSEQUENT INSTALMENTS —UNMERCHANTABLE—IMPLIED CONDITION AS TO FITNESS.

Jackson v. *Rotax Motor Co.* (1910) 2 K.B. 937 was an action by the vendor of goods to recover the price of goods which had

been rejected by the purchasers as being unmerchantable. The circumstances of the case were that the defendants had contracted to buy from the plaintiffs a quantity of motor horns to be delivered in instalments. The first instalment was received and accepted by the defendants, but subsequent deliveries were refused on the ground that the goods were unmerchantable, it appearing that owing to careless packing about one-half were dented, and they were badly polished. An Official Referee, who tried the action, found that the defects could be made good at a trifling expenditure, and gave judgment for the plaintiff for the price less the estimated cost of putting the horns in proper condition, and this judgment was affirmed by a Divisional Court (Darling and Bucknill, JJ.); but the Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ.) took a different view, and held that the Divisional Court had put an entirely new meaning on the words "merchantable," namely, that defective goods are merchantable if they only want some trifling thing done to make them saleable, for which their Lordships in appeal held there was no authority, and in their judgment the fact that a large part of the goods were not in fact fit for the market, constituted them unmerchantable, and the defendants were entitled to reject them in toto, and were not precluded from so doing by reason of their having accepted a previous instalment, or because some of the goods subsequently tendered were merchantable.

NEGLIGENCE—LESSOR AND LESSEE—CONTRACT BY LESSOR TO MAKE REPAIRS ON DEMISED PROPERTY—ACCIDENT OCCASIONED BY NEGLIGENCE OF LESSOR'S CONTRACTOR—LIABILITY OF LESSEE TO PERSONS INJURED—RIGHT OF LESSEE TO RECOVER AGAINST LESSOR'S CONTRACTOR.

City of Birmingham Tramways Co. v. *Law* (1910) 2 K.B. 965. This was a somewhat unusual case. The plaintiffs were lessees from a municipal corporation of a tramway. The lessors agreed to execute certain repairs thereon, and engaged the defendant to execute them; by his contract to which the lessees were not parties, he bound himself to indemnify the lessors against all claims arising from any negligence on his part in the execution of the repairs, and that he would be responsible for all accidents. During the repairs the tramcars continued to run, and owing to the defendant's negligence a car was derailed and the driver and passengers were injured, to whom the plaintiffs paid compensation for their injuries; this compensation the plaintiffs claimed now to recover from the defendant. The defendant contended

that there was no liability because by the terms of the lease the plaintiffs were debarred from making any claim against their lessors for any compensation for injuries caused by or arising out of the execution of the repairs, and because the corporation was not liable the defendant as the servant or agent of the corporation was not liable either—his duty to exercise care arising out of his contract with the corporation, to which the plaintiffs were not parties. It was also contended that the defendant's negligence did not render the plaintiffs liable to compensate their passengers, which liability, if any, must arose from the plaintiffs' own negligence. Lawrence J., who tried the action, however, held that the plaintiffs were entitled to succeed, because, as to them, the defendant, apart from his contract with the lessors, was in the position of a trespasser and had no right to be on their property at all, and to justify his being there at all he had to rely on his contract with the lessors, and that contract he had not carried out. As regards the question of the plaintiffs' liability to the injured passengers, the learned judge in effect held that the plaintiffs' liability arose because of the defendants' negligence, because the plaintiffs owed a duty to passengers to run the tramcars in safety, which duty they had failed in by reason of the defendant's negligence, to whom had been delegated the task of executing the necessary repairs.

COMPANY—DEBENTURE—FLOATING SECURITY—GARNISHEE ORDER.

Evans v. *Rival Granite Quarries* (1910) 2 K.B. 979. This was a contest between a debenture holder whose debenture constituted a floating charge on all the assets of a company, and an attaching creditor who had garnished the balance standing to the credit of the company at its bankers. Prior to the attaching order the debenture holder whose debenture was in arrear had demanded payment thereof by the company, but had taken no further step to enforce his security. After the attaching order he gave notice to the bank that he contested the attaching creditor's right and required the bank to pay the balance to him. The County Court judge made an order to pay over to the attaching creditor, but a Divisional Court (Phillimore and Bucknill, JJ.) set aside the order, but the Court of Appeal (Williams, Moulton and Buckley, L.JJ.) reversed their decision, and held that a floating charge, such as was in question here, can only be effectively brought into operation by the appointment of a receiver, it does not enable the holder to claim payment of some particular asset. Here, until the holder had exercised his right

the company was entitled to carry on its business in the ordinary way, and its creditors entitled to obtain payment of their debts, which could not be interfered with by the debenture holder merely giving notice of his claim. It may be remarked that the express point decided does not appear to have been covered by any previous decision.

SALE OF GOODS—DELIVERY OF GOODS NOT ACCORDING TO CONTRACT —RESALE BY PURCHASER—CONDITION—WARRANTY—CONTRACT NEGATIVING WARRANTY.

Wallis v. *Pratt* (1910) 2 K.B. 1003. This is another action for breach of contract of sale of goods. The goods purchased were described as "common English sanfoin," the contract, however, expressly provided that "the sellers give no warranty express or implied as to growth, description or other matters." Seed equal to sample was delivered under the contract, and part of it was resold by the plaintiffs as "common English sanfoin." The sample and the seed delivered were not in fact "English sanfoin," but giant sanfoin, an inferior quality, but the difference could not be discovered until the seed had been sown and had come up. The plaintiffs reasonably and properly settled a claim for damages brought against them by their sub-purchaser, and now claimed to recover from the defendants the amount so paid. Bray, J., on a special case stated by an arbitrator, held that the defendants were liable, but the majority of the Court of Appeal (Williams and Farwell, L.JJ.) held that the plaintiffs having accepted and resold the seed had put it out of their power to treat the description of the goods sold as a condition, on a breach of which they were entitled to reject the goods, and could therefore only treat it as a warranty the breach of which would ordinarily entitle a purchaser to damages; but they were debarred from that relief by the condition excluding any warranty on the defendants' part. Moulton, L.J., dissented on the ground that by the terms of the contract the defendants were bound to deliver English sanfoin, which they had not done, and had therefore committed a breach of the contract for which the plaintiffs were entitled to damages.

PRACTICE—REPRESENTATIVE ACTION—ACTION BY SOME SHIPPERS OF GOODS ON A GENERAL SHIP, ON BEHALF OF THEMSELVES AND OTHER SHIPPERS—"PERSONS HAVING THE SAME INTEREST IN THE CAUSE OR MATTER"—RULE 131—(ONT. RULE 200).

Markt v. *Knight SS. Co.* (1910) 2 K.B. 1021. This was an action brought by some of the shippers of goods on a general

ship, against the shipowners to recover the value of the cargo, the plaintiffs claiming to sue on behalf of themselves and forty-four other shippers on the same vessel. The vessel had been sunk by a Russian cruiser as carrying contraband of war, and both ship and cargo had been wholly lost. The writ was indorsed with a claim for "damages for breach of contract and duty in and about the carriage of goods at sea." The defendants applied to set aside the writ, or, in the alternative, that so much of the writ as referred to the claims of other parties should be struck out. The Master refused the motion, and his refusal was upheld by a judge. The majority of the Court of Appeal (Williams and Moulton, L.JJ.), however, were of the opinion that the plaintiffs were not persons "in the same interest with those they claimed to represent," and that the plaintiffs consequently were not entitled to represent them. Buckley, L.J., however, dissented, and thought that the plaintiffs might sue on behalf of themselves and all other shippers of goods which were not contraband of war. Moulton, L.J., was of opinion that no representative action lies where the sole relief sought is damages, which seems to be common sense, for how could a judgment in an action constituted as in this case in any way enure to the benefit of persons not parties? The idea of a representative action is that the judgment rendered in it will enure to the benefit of all parties represented as, for example, to take a common case, the interpretation of a document in which many persons are interested, but an award of damages to the plaintiff in this case would not satisfy the claims of the parties they claimed to represent. It does not follow from this case that the several shippers might not join in one action. It merely decides that it is not a case in which a plaintiff could properly represent others who are not parties.

Correspondence

PAYMENT BY CHEQUE.

The Editor, CANADA LAW JOURNAL:

DEAR SIR,—Your note on payment by cheque, 47 C.L.J., p. 21, seems to imply that a cheque expressed to be "in full" of a debt may not be applied upon account, notice being given that it is only so accepted. In this connection the distinction between a debt and a tort seems important only as taking the latter out of the rule in *Cumber* v. *Ware,* 1 Str. 426, which, in any event is abrogated in Ontario by statute. In *Henderson* v. *Underwriters,* 65 L.T. 732, the cheque was given and accepted "in full," pursuant to an express agreement to that effect. This agreement was afterwards repudiated by the defendant and the repudiation accepted by the plaintiff. Of course it followed that the money paid under it must be returned. *Mason* v. *Johnston,* 20 Ont. App. 412, appears to be an express authority that a cheque payable to order, expressed to be "in full" of a debt may be retained and applied upon account, notice being given the debtor that it is only so accepted, and the balance demanded. If in error, kindly correct.

Yours truly,

SUBSCRIBER B.

REGINA, Jan. 18, 1911.

[If there is nothing in a case to warrant a plea of accord and satisfaction, except the circumstance that the debtor has sent his cheque marked "in full" which the creditor has retained and cashed, but notified the debtor he will not accept in full, we agree that that does not amount to accord and satisfaction and the creditor is entitled to sue for the balance. In addition to the cases referred to in our former note, we may mention another decision of the English Court of Appeal which seems to support this view, viz., *Miller* v. *Davies,* 68 L.T. Jour. 43. The fact that the cheque is made payable "to order" and has been indorsed by the creditor, according to *Mason v. Johnston* appears to make no difference. Our former note was an answer to an inquiry for cases subsequent to *Day* v. *McLea.*—EDITOR, C.L.J.]

REPORTS AND NOTES OF CASES.

England.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Lords Macnaghten, Atkinson, Shaw and Mersey.] [Nov. 1, 1910.

BURRARD POWER CO. *v.* THE KING.

Constitutional law—Water rights—Railway belt of British Columbia—Dominion or provincial jurisdiction.

Appeal from the judgment of the Supreme Court of Canada affirming the decision of the Exchequer Court (see ante, vol. 46, p. 332). A grant was made to the appellants of certain water rights in the railway belt of British Columbia by the Commissioners purporting to act under the Statute of British Columbia in that behalf.

Held, that this grant was invalid in that these water rights were vested in the Dominion Government and not in the Province of British Columbia, consequently the Provincial Legislature could not deal with them.

Lafleur, K.C., and *Hamer Greenwood,* for appellants. *Newcombe,* K.C., and *Bateson,* K.C., for respondents.

Lords Macnaghten, Atkinson, Shaw and Mersey.] [Nov. 1, 1910.

STANDARD IDEAL CO. *v.* SANITARY MANUFACTURING CO.

Trade mark—"Standard."

Appeal from the judgment of the Court of King's Bench for Quebec which confirmed a decision of the Superior Court of that province. By the judgment of the Court of King's Bench the defendant was restrained from using the word "Standard" in connection with certain articles upon which that word was stamped or from advertising or from so describing his wares and merchandise. The plaintiff was an American corporation, the defendant a Canadian company.

Held, that the word "Standard" cannot properly be registered as the trade mark under the Canadian Trade Mark and Design Act of 1879.

Shepley, K.C., *Lafleur,* K.C., and *C. A. Pope,* for appellants. *Doherty,* K.C., and *Trihey,* for respondents.

Dominion of Canada.

SUPREME COURT.

Man.] WILLIAMS *v.* BOX. [Nov. 2, 1910.

Title to land—Mortgage—Foreclosure—Equitable jurisdiction of court—Opening foreclosure—Construction of statute—Real Property Act, R.S.M. 1902—*Equity of redemption—Certificate of title.*

By the effect of 126 of the Manitoba Real Property Act, R.S.M. 1902, c. 148, as amended by s. 3of c. 75, 5 & 6 Edw. VII., the court has equitable jurisdiction to open up foreclosure proceedings in respect of mortgages foreclosed under sections 113 and 114 of the Act, notwithstanding the issue of a certificate of title, in the same manner and upon the same grounds as in the case of ordinary mortgages, at all events where rights of a third party holding the status of a bonâ fide purchaser for value have not intervened. Judgment appealed from (19 Man. R. 560) reversed. See 45 C.L.J. 491 and 46 C.L.J. 230.

Appeal allowed with costs.

Coyne, for appellant. *G. W. Baker,* for respondent.

B.C.] SISTERS OF CHARITY *v.* VANCOUVER. [Nov. 21, 1910.

Construction of statute—Quasi judicial duties—Delegation of legislative or administrative power.

The Vancouver Incorporation Act, 64 Vict. c. 54 (B.C.), by sub-s. 3 of s. 46 provides that "The buildings and grounds of and attached to and belonging to any incorporated seminary of learning, public hospital, or any incorporated charitable institution, whether vested in trustees or otherwise, so long as such buildings and grounds are actually used and occupied by such institution, or if unoccupied, but not if otherwise used or occupied; provided, that such grounds shall not exceed in extent the amount actually necessary for the requirements of the institution. The question as to what amount of land is necessary shall be decided by the Court of Revision, whose decision shall be final."

Held, per DAVIES, DUFF and ANGLIN, JJ.:—The functions in respect of the limitation of exemptions from taxation so vested in the Court of Revision are quasi-judicial and must be exercised in each case with respect to that case alone; it is not vested with power to lay down a general rule based solely upon general considerations.

Per IDINGTON, J.:—The provision in question was merely a delegation of a legislative or administrative power, probably carrying with it a duty, but in no manner implying the discharge of a judicial duty subject to review or supervision.

In proceedings, by certiorari, to remove a decision of the Court of Revision, the evidence adduced in support of the contention that the court had failed to dispose of the question in a proper manner consisted merely of a minute of its proceedings whereby it was resolved "that all charitable institutions mentioned in sub-section 3 of section 46 of Vancouver Incorporation Act' be exempted from taxation to the extent of the area occupied by the buildings thereon and an additional amount of land equal to 25 per cent. of the area, and that the assessment roll for 1900, as amended, be confirmed."

Held, affirming the judgment appealed from (15 B.C. Rep. 344), that this minute, in the absence of further evidence, was not incompatible with the view that the Court of Revision had examined each particular case before deciding to act in the sense of the minute and that it would be a proper direction in each individual case.

Judgment appealed from (15 B.C. Rep. 344) affirmed, and appeal dismissed with costs.

Lafleur, K.C., for appellant. *Craig,* for respondents.

Man.] [Nov. 21, 1910.

LEWIS *v.* STANDARD MUTUAL FIRE INS. CO.

Fire insurance policy—Statutory conditions—Gasoline on premises—Illuminating oils insured—Notice of loss—Remedial clause in Act—Discretion of court.

By the Manitoba Fire Insurance Act, R.S.M. 1902, c. 87, an insurance company insuring against loss by fire is not liable "for loss or damage occurring while . . . gasoline . . . is stored or kept in the building insured or containing the property insured unless permission is given in writing by the company." Insurance was affected "on stock consisting chiefly of illuminat-

ing and lubricating oils, etc., and all other goods kept by them for sale." A small quantity of gasoline was in the building containing the stock when it was destroyed by fire.

Held, gasoline being an illuminating oil, it was part of the stock insured and the above statutory condition could not be invoked to defeat the policy.

Per ANGLIN, J.:—If gasoline was not insured as an illuminating oil it was within the description of "all other goods kept for sale."

By s. 2 of the Insurance Act "where, by reason of necessity, accident or mistake the conditions of any contract of fire insurance on property in this province as to the proof to be given to the insurance company after the occurrence of a fire have not been strictly complied with . . . or where from any other reason the court or judge before whom a question relating to such insurance is tried or inquired into considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions," the company shall not be discharged from liability.

By statutory condition 13 (*a*) in the sch. to the Fire Insurance Policy Act every person entitled to make a claim "is forthwith after loss to give notice in writing to the company."

Held, FITZPATRICK, C.J., dissenting, that the above clause applies to said condition.

Judgment appealed against (19 Man. R. 720), *sub nom. Prairie City Oil Co.* v. *Standard Mutual Fire Ins. Co.,* 46 C.L.J. 271, 462, reversed, FITZPATRICK, C.J., dissenting.

Appeal allowed with costs.

Coyne and *S. H. Green,* for appellant. *Affleck,* for respondents.

Dom. Ry. Board.] [Dec. 9, 1910.

BLACKWOODS CO. *v.* CANADIAN NORTHERN RDY. CO.

Railway Board—Jurisdiction—Spur tracks.

The Board of Railway Commissioners for Canada has not the power to order that a private industrial spur-track or siding, constructed and operated under an agreement between a railway company and the owner of the land upon which it is laid, and used only in connection with the business of such owner, shall be also used and operated as a branch of the railway with which it is connected. See 46 C.L.J. 750.

Appeal allowed with costs.

W. L. Scott, for appellants. *Chrysler,* K.C., for respondents.

Province of Ontario.

COURT OF APPEAL.

Full Court.] REX *v.* WISHART. [Dec. 31, 1910.

Criminal law—Fugitive Offenders Act—Arrest in Ontario warrant issued in Ireland—Endorsing warrant—Commitment of accused to await return—Police magistrate.

Appeal by defendant from an order of MEREDITH, C.J.C.P., who refused to discharge defendant from custody upon a warrant issued in Ireland and not endorsed as required by the Fugitive Offenders Act, R.S.C. 1906, c. 154, s. 8. The prisoner was brought upon habeas corpus, and remanded to the custody of the jailer at Toronto. He had been apprehended and brought before the police magistrate of the city under a provincial warrant, but when the warrant was produced it was not endorsed by the Governor-General or a judge as provided by the Act. Upon the argument for the discharge, the Chief Justice endorsed the warrant and confirmed the commitment. It was contended that the police magistrate could not proceed finally to deal with the case and commit the prisoner, the warrant not having been endorsed.

Held, 1. The requisition for the endorsement of the warrant was enacted with an object beyond that of merely rendering it available for the apprehension of the accused without any other warrant. The endorsation is a requirement for the protection of the accused against frivolous or vexatious proceedings. The expression "endorsed warrant" has greater significance than as a mere term of distinction between it and another warrant.

2. It is safer in dealing with the matter involving restraint of liberty to adhere to the primary meaning of the language used, in the absence of a context manifestly controlling it, and pointing clearly to a different meaning.

Appeal allowed and defendant discharged.

O'Connor, for defendant. *Cartwright*, K.C., for the Crown.

Full Court.] REX *v.* SAM SING. [Dec. 31, 1910.

Criminal law—Carnal knowledge of girl by prisoner on his own premises.

Case stated by the judge of the County Court of Carleton,

by whom the prisoner was convicted under Crim. Code s. 217, for having a girl on his premises for immoral purposes.

Held, the case was one not of permitting, but of committing the defilement of a girl on the premises. Sec. 217 relates only to parties who induce or knowingly suffer girls under 18 to resort to, or be upon, their premises for the purpose of being unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man or generally. This is inapplicable to the facts of this case; a civil action might lie, but there is criminal liability under the code. Prisoner discharged.

G. F. Henderson, for the prisoner. *Cartwright,* K.C., and *Bayley,* K.C., for the Crown.

Full Court.] Dec. 30, 1910.

REX *v.* FREJD.

Criminal law—Conviction by justices not having jurisdiction —Imprisonment under—Habeas corpus—Order quashing warrant of commitment and directing bringing of prisoner before justices for preliminary hearing—Crim. Code, sec. 1120.

Appeal by the defendant from an order of CLUTE, J.

The defendant was apprehended on a charge of issuing a false cheque and brought before two justices of the peace at Cochrane. He pleaded guilty and they imposed a sentence of imprisonment in the Central Prison at Toronto. The offence was an indictable one, and not one of those which two justices are, under Part XVI. of the Criminal Code, authorized to try. They should have held only a preliminary inquiry, and sent the accused to the gaol of the district to await trial until bailed. Being taken to the Central Prison, he applied for and obtained a writ of habeas corpus and certiorari in aid, and, on the papers being returned thereunder, moved for his discharge. CLUTE, J., made an order quashing the warrant of commitment to the Central Prison, but, instead of discharging the defendant from custody, ordered that he be removed back to Cochrane and grought before the two justices for a preliminary hearing upon the charge. CLUTE, J., considered that the case came within sec. 1120 of the Criminal Code, 1906 (formerly sec. 752 of the Criminal Code, 1892), now amended by 7 and 8 Edw. VII. ch. 18, sec. 14, and, as amended, providing that, whenever any prisoner in custody

charged with an indictable offence has taken proceedings before a court or judge by way of certiorari, habeas corpus, or otherwise, to have the legality of his imprisonment inquired into, such judge or court may, with or without determining the question, make an order for the further detention of the person accused, and direct the judge or justice under whose warrant he is in custody, or any other judge or justice, to take any proceedings, hear such evidence, or do such further act as, in the opinion of the court or judge, may best further the ends of justice.

The defendant appealed from the order.

MAGEE, J.A.:—The tendency of legislation is to prevent the ends of justice being interfered with by reasons of mistakes, and to ensure the substantial carrying out of the law; and, indeed, the furtherance of these ends is the express object of sec. 1120. There is no reason why a mistake in or after conviction for a crime should not be remedied as well as one before—indeed, rather the contrary. If there is nothing in principle against it, are the words of this section wide enough to cover cases of conviction, or is there anything to indicate that they were not so intended? We gain little or no assistance from any of the words in the section other than the words "charged" and "accused," which are here challenged, although one's attention is drawn by the words "legality of his imprisonment" and "further detention of the person accused." But is a person any the less "charged with" an offence or "accused" of it because the charge or accusation has been established? . . .

The proceedings of certiorari and habeas corpus, in which the power is given, may arise at either stage, and the legislature has given no indication of an intention to limit the words of a beneficial provision. I see no reason so to limit it. If, then, the section applies after a valid conviction, is it, as here argued, less applicable after a wholly void conviction, made without jurisdiction, and when the prisoner is not absolved from being tried for his offence, and there is nothing in which the charge could be said to merge? The argument appears to be stronger against such a conclusion. The section uses the words "further detention," but that does not necessarily mean detention in the same place, but detention in the custody of the law. . . .

Appeal dismissed.

Hassard, for defendant. *Cartwright,* K.C., for the Crown.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] PRATT *v.* BALCOM ET AL. [Jan. 14.

Deed—Reservation of life estate—Money charge—Question of intention.

Where a father and mother by deed conveyed all their property to two of their sons subject to a life estate in the grantors and to the payment of certain sums of money to other children of the grantors, the grantees took the property subject to such life estate and to such payments.

Under a deed or will whether moneys are a charge upon land is always a question of intention to be gathered from the terms of the instrument.

Roscoe, K.C., for appellant. *J. J. Ritchie*, K.C., contra.

Longley, J.] [January 24, 1911.

THE CUMBERLAND RAILWAY & COAL CO. *v.* MCDOUGALL ET AL.

Contempt of court—Acts constituting—Attachment for.

An order granted by a judge of the Supreme Court and affirmed by the court on appeal, restrained certain persons specifically mentioned and others described generally as members of the United Mine Workers of America, being members of district 36 of that organization and all members of Local Union 469, of the United Mine Workers of America, until final judgment, from besetting the places where plaintiff company carries on its business, from intimidating by violence or threats persons employed by the company and from persistently following such persons in a disorderly manner through the streets, etc., with a view to inducing them to break their contracts. It was established by affidavits produced on behalf of the plaintiff that a crowd of between three and four hundred persons, for the most part members of Local Union 469, and including the defendants, patrolled the street in the vicinity of the exit from plaintiff's mine about the time when the men employed therein were leaving their work, and assailed them with offensive cries such as "scab," and jostled them in a

forcible manner, and impeded them in their efforts to reach their homes.

Held, 1. Sufficient ground for an attachment for contempt.

2. No distinction could be made between the persons who were specifically named in the restraining order and those who were included within its general terms.

Mellish, K.C., for application. *O'Connor,* K.C., for defendants, contra.

Meagher, J.] CHISHOLM *v.* HALIFAX TRAM CO. [Jan. 25.

Street railroads—Defective condition of track—Liability of company for injuries resulting from—Damages.

Plaintiff, a medical man, was thrown from his sleigh and severely injured in consequence of one of the runners of plaintiff's sleigh being caught by a guard rail at a curve on defendant's line. The guard rail at the point where the accident occurred was shewn to be unreasonably high being nearly if not quite two inches above the level of the other rail. The evidence shewed that numerous other accidents happened at the same point attributable to the same cause, and that the effect of injuries received in plaintiff's case, apart from confinement to the house and loss of business, was to permanently injure one of his arms and to incapacitate him in part from the practice of one branch of his profession.

Held, under the circumstances it was to be assumed that defendant company had notice of the defective condition of the rail but that independently of that it was bound to keep its track in a reasonably safe condition for the public, and having failed to do so it was responsible in damages. The plaintiff was entitled to recover against defendant company the sum of $2,800 and costs.

J. J. Ritchie, K.C., for plaintiff. *Mellish,* K.C., for defendant.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] COPPEZ *v.* LEAR. [Dec. 2, 1910.

Wages—Assignment of.

Appeal from judgment of Prendergast, J., noted vol. 46, p. 747. Dismissed with costs.

Full Court.] STANGER *v.* MONDOR. [Dec. 20, 1910.

Registry Act—Real Property Act—Filing deed after application for certificate of title—Priority.

Appeal from judgment of Robson, J., noted vol. 46, p. 745, dismissed with costs.

KING'S BENCH.

Mather, C.J.] CITY OF WINNIPEG *v.* BROCK. [Dec. 19, 1910.

Municipality—Meaning of "passage of the by-law"—Jurisdiction of judge as persona designata—Winnipeg charter—Injunction—By-law taking effect on the happening of some contingent event.

Where a statute provides that a municipality may pass a by-law for diverting or closing up roads and streets and conveying the same or any part thereof to a railway company and for determining what persons or classes of persons are injuriously affected by the closing of such streets, and enacts that no other persons or classes of persons shall be entitled to any compensation for damages thereby caused to them, unless they appeal to a judge of the Court of King's Bench "within ten days after the passage of the by-law," and that such judge upon such appeal may order that an appellant shall be entitled to compensation, the judge to whom any such application is made is only a persona designata and has no jurisdiction to entertain it or make any order if the application is not made within the time limited, notwithstanding the statute goes on to say that the decision of such judge shall be final and conclusive and shall not be appealed from or moved against by any party. The expression "pasasge of the by-law" means the final assent thereto by the council and the signature and sealing of the same, and the day when that takes place is the date of the passage of the by-law, although it contains a provision that it shall not take effect until the happening of some named contingency.

Ex parte Rashleigh, 2 Ch. D. 9 and *Hinding* v. *Cardiff*, 2 O.R. 329, followed.

If a landowner, relying on an order of a judge made upon his application by way of appeal under such a by-law more than

ten days after its passage, is proceeding to have his damages assessed by arbitration, the court will restrain such proceedings by injunction, because such an order is wholly without jurisdiction and therefore absolutely null and void.

A municipal by-law is not invalid merely because it is only to take effect in the future upon the happening of some contingent event.

Dillon on Municipal Corporations, par. 309; *Bradley* v. *Perkins*, 33 Sou. R. 351, and 28 Cyc. 392 et seq., followed.

Clark, K.C., for plaintiff. *Fullerton*, for defendant.

Robson, J.] RE FEDORENKO, No. 2. [Dec. 17, 1910.

Extradition—Requisition from foreign government—Extradition treaty with Russia, articles VIII. and IX.

When, under the terms of an extradition treaty with a foreign government, as in the case of the treaty with Russia printed in the *Canada Gazette*, for 1887 at page 1918, Articles VIII. and IX., a requisition from that government for the surrender of a fugitive is provided for as preliminary to any proceedings for the arrest of the fugitive, any such proceedings taken without such requisition having been made are entirely unauthorized, and the fugitive, even after he has been committed for extradition by a judge of this court, should be discharged upon habeas corpus.

Sections 3 and 10 of our Extradition Act, R.S.C. 1906, c. 155, distinctly provide that nothing in the Act which is inconsistent with any of the terms of an extradition treaty shall have effect to contravene the treaty.

Re Lazier, 3 Can. Cr. Cas. 167, 26 A.R. 260, distinguished on the ground that there was no corresponding provision in the extradition treaty with the United States.

Howell and *A. V. Hudson*, for the Empire of Russia. *Hagel*, K.C., and *Finklestein*, for prisoner.

Mathers, C.J.] [Dec. 30, 1910.

ARMSTRONG *v.* TYNDALL QUARRY CO.

Master and servant—Wrongful dismissal—Measure of damages—Corporation—Seal—Liability of company upon contract not under its seal—Presumption of yearly hiring.

Held, 1. A company incorporated under the Manitoba Joint

Stock Companies Act to carry on a quarrying business will be liable for wrongful dismissal of a person employed to act as general foreman by the manager of the company, although the contract is not under its seal. *McEdwards* v. *Ogilvie*, 4 M.R., followed.

2. By the law of England and Canada, a general hiring, no time being specified, will be presumed to be for a year certain, especially if it is at a yearly salary. *Buckingham* v. *Surrey & Hants Canal Co.*, 46 L.T.N.S. 885; and *Rettinger* v. *McDougall*, 9 U.C.C.P. at p. 487, followed.

3. The onus is on the defendant seeking to shew, in reduction of damages for the wrongful dismissal of the plaintiff, that he might have obtained other employment by reasonable diligence, and a discharged workman is not bound to accept a less remunerative position or one of a lower grade even at the same wages, nor need he abandon home and place of residence and go to another province or country to seek employment. Sedgwick on Damages, 206; *Costigan* v. *Mohawk*, 2 Denio at p. 616; 26 Cyc. 1015, and MacDonell on Master and Servant, 159, followed.

4. The tribunal assessing the damages in such a case, whether a jury or a judge trying it without a jury, has to speculate on the chance of the servant getting a new place and arrive at the best conclusion it can in view of all the circumstances as to the probable time that will elapse before another similar employment can be obtained, bearing in mind that the law considers that employment in any ordinary branch of industry can be obtained by a person competent for the place. *Beckham* v. *Drake*, 2 H.L.C. at p. 666, and *Sowdon* v. *Mills*, 30 L.J.Q.B. 176, followed.

Howell and *Locke*, for plaintiff. *Hough*, K.C., and *A. C. Ferguson*, for defendants.

MacDonald, J.] [January 6.

WINNIPEG *v.* TORONTO GENERAL TRUSTS CORPORATION.

Municipality—Compensation for injury to land caused by exercise of municipal powers when no part of the land actually taken—Date from which time allowed for making claim is to be computed.

Sec. 775 of the Winnipeg Charter, 1 & 2 Edw. VII. c. 77, provides that every claim for compensation for any damage

necessarily resulting to an owner of land entered upon, or used by the city in the exercise of any of its powers, or injuriously affected thereby (the right to which is given by the preceding section), shall be made within one year from the date when the real property was so entered upon, taken or used, or when the alleged damages were sustained or became known to the claimant.

Held, in the case of real property not entered upon, taken or used by the city but only injuriously affected by the exercise of its powers, the year allowed for making the claim for compensation counts only from the date of the completion of the work provided for by the by-law, or from the date when the damages became known to the claimant if that date was later, and not from the date of the commencement of the work, as it would in the case of land entered upon, taken or used.

Clark, K.C., for the plaintiff. *Wilson,* K.C., *Hoskin,* K.C., and *McKerchar,* for the several defendants.

RULES OF COURT—ONTARIO.

For the convenience of the profession in the Province of Ontario we publish the Rules of the Court of the Supreme Court of Judicature for Ontario, promulgated December 31st, 1910.

1304. Any condition precedent to the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be, and subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case by the plaintiff or defendant shall be implied in his pleading.

1305. Rule 806, as amended by Rules 1277 and 1303, is hereby repealed, and the following substituted therefor:

(1) The Appeal Book shall, when a printed book is necessary, be printed in accordance with the rules in Schedule A hereto, and, unless these rules are complied with, shall not be received without the leave of a Judge.

(2) If the press has not been carefully corrected, the Court in its discretion may (*a*) disallow the cost of printing; (*b*) decline to hear the appeal; or (*c*) make such order as to postponement and payment of costs as may seem just.

(3) In the Appeal Book there shall not be any unnecessary repetition of headings and documents; and parts of documents that are not relevant to the subject matter of the appeal, or are merely formal, shall not be printed at length, but any document not printed shall be referred to in its appropriate place in the book.

(4) When one party objects to the printing of any document, or part of document, upon the ground that it is not necessary, and the other party insists upon it being printed, it shall be printed with a note indicating that it is printed at the instance of that party, and if upon taxation it is found that the printing was unnecessary, the costs of such printing shall be disallowed to, and in any event shall be paid by the party at whose instance it was printed.

(5) When a book is printed in form suitable for use upon an appeal to His Majesty in council, 50 copies, and in all other cases, 30 copies, in sheet form unbound, shall be deposited with the Registrar for use upon any further appeal, in addition to eleven bound copies for the use of the Court.

SCHEDULE A.—RULES AS TO PRINTING.

1. The book shall be printed upon both sides of the paper, which shall be of good quality, not less than 60 pounds to the ream.

2. The sheet when folded and trimmed shall be 11 inches long and 8½ inches wide.

3. The type in the text shall be pica, but long primer shall be used in printing accounts, tabular matter and notes.

4. The number of lines on each page shall be 47, as nearly as may be, exclusive of headlines, each line to be 5¾ inches in length, exclusive of marginal notes, and every tenth line on each page shall be numbered in the margin, and the other margin shall be one and one-half inches wide.

5. The books shall be bound in paper, not less than 65 pounds to the ream, and the backs shall be reinforced with cloth.

6. In cases in which an appeal lies to His Majesty in Council, and in any other case in which the parties so agree or a Judge upon the application of either party so directs, marginal notes, such as are required upon an Appeal to His Majesty in Council shall be printed.

7. In other cases there shall be a headline on each page of evidence, giving the name of the witness and stating whether the evidence is on examination-in-chief, cross-examination, or

as the case may be, and answers shall follow the questions immediately and not commence a separate line.

8. All exhibits shall be grouped, and be printed in chronological order.

9. At the beginning of the book there shall be an index setting out in detail the contents of the book in four parts, as follows:

Part 1. A statement of the case and each pleading, order or other document in chronological order, with its date.

Part 2. Each witness by name, stating whether for plaintiff or defendant, examination-in-chief or cross-examination, or as the case may be.

Part 3. Each exhibit, with its description, date and number in the order of filing.

Part 4. All judgments in the Courts below, with the reasons for judgment, and the name of the Judge delivering the same, and the reasons for and against appeal.

10. The name of the Court, Judge or Official appealed from shall be stated on the cover and title page.

11. The book shall contain the date of the first proceeding and of the delivery of the several pleadings, but the style of the cause shall not be repeated.

12. Disbursements reasonably and properly incurred for printing Appeal Books in the form prescribed by these Rules shall be allowed.

1306. Rule 748 and Form 78 are hereby repealed and the following enacted in lieu thereof:

748. The Master before he proceeds to hear and determine shall require an appointment according to Form No. 78 to be served upon all persons made parties before the judgment appearing to have any lien, charge or incumbrance upon the lands in question, subject to the plaintiff's mortgage, and shall in the notice to the other parties interested, required by Rule 658, state the names and nature of the claims of those so notified, and of those added under the provisions of Rule 746 as appearing to have a lien, charge or incumbrance upon the said lands. Such notice may be in the Form 78a.

Form 78. *Notice to parties by writ having incumbrances.*

(Court and Cause.)

Having been directed by the judgment in this action to inquire whether any person other than the plaintiff has any lien, charge or incumbrance upon the lands in question in this action subsequent to the plaintiff's claim, and to take an account of the

amount due to the plaintiff and any such person. And it having been made to appear that you may have some lien, charge or incumbrance thereon you are hereby notified that I have appointed day, the day of next at my chambers in the Court House at at o'clock to proceed with the said inquiry and to determine the amount of the claim of the plaintiff, and of such incumbrancers as may come in and prove their claims before me.

If you fail to attend upon such appointment, and to prove your claim, the reference may proceed in your absence, and you will receive no further notice of the proceedings in this action, and you will be treated as disclaiming any lien, charge or incumbrance upon the said lands, and will stand foreclosed from any such claim.

Dated this day of 19 .

W. L., Master.

Form 78a. *Notice to original defendants other than incumbrancers.*

(Court and Cause.)

Having been directed by the judgment in this action to inquire whether any person other than the plaintiff has any lien, charge or incumbrance upon the lands in question in this action subject to the plaintiff's claim thereon.

You are hereby notified that it has been made to appear to me that the persons named in the schedule hereto may have some lien, charge or incumbrance thereon, and I have, therefore, caused such of them as are not already parties thereto to be added as parties in my office, and I have appointed day, the day of next at my chambers in the Court House at at o'clock, to inquire and determine whether the said parties have any such lien, charge or incumbrance, and to fix and ascertain the amount thereof, and the amount of the plaintiff's claim upon his security.

If you do not then and there attend, the reference will be proceeded with in your absence, and you will receive no further notice of the proceedings in this action.

Dated this day of 19 .

W. L., Master.

SCHEDULE.

Incumbrancer.		Nature of claim.
E.g.	A. B.	Mortgage dated.
	C. D.	Execution.
	E. F.	Mechanics lien.

1307, Rule 777, as amended by Rule 1278, is further amended by adding the words "or matter" after the word "action," where it first occurs in subsection (1) of Rule 777.

Flotsam and Jetsam.

Ascum—"I see there's some talk upon the question of abolishing capital punishment. Would you vote to abolish it?

Logie—"No, sir; capital punishment was good enough for my ancestors, and it's good enough for me."—*Exch.*

The return of a sailor and a lawyer as representatives of Portsmouth at the recent General Election, reminds one that Portsmouth was once represented by a member who united in himself the qualifications of both professions. This was Erskine, who served four years in the navy before he left the sea to become the most famous advocate in the annals of the English law. He was elected for Portsmouth on the 20th November, 1783, but lost his seat at the dissolution in the following March. He won it back again, however, at the General Election in the autumn of 1790, and retained it until he was made Lord Chancellor and raised to the peerage on the 7th of February, 1806.—*Law Notes.*

Some years ago there was a well-known K.C., with a large practice, who had the Cockney habit of dropping his "h's." He had a strange and an intense dislike to the late Lord Selborne, who, it will be remembered, was the compiler of a deservedly popular anthology of hymns. The counsel in question was one day seated inside the Bar awaiting the opening of the court, and when the usher announced the approach of his Lordship, he was heard to remark sotto voce, "'Ere 'e comes, the 'oly old 'umbug, a 'ummin' 'is 'ims—'ow I 'ate 'im!"—*Law Notes.*

Canada Law Journal.

VOL. XLVII. MARCH 1. No. 5.

OUR NEW GOVERNOR-GENERAL.

The announcement of the official appointment of the Duke of Connaught as Governor-General of Canada, appears as follows in *The Times*:—"His Majesty The King has been graciously pleased to approve of the appointment of Field-Marshall His Royal Highness the Duke of Connaught and Strathern, K.G., K.T., K.P., G.M.B., G.C.S.I., G.C.M.G., G.C.I.E., G.C.V.O., P.C., to be Governor-General and Commander-in-Chief of the Dominion of Canada, in succession to the Right Honourable Earl Grey, G.C.M.G., G.C.V.O. His Royal Highness, who will be accompanied by the Duchess of Connaught, will assume office in September, and will hold the appointment for a period of two years, which may be subject to further extension."

The Duke of Connaught was born at Buckingham Palace, in 1850 and, after he had completed his military education at Woolwich Academy, entered the army in 1868, his first commission being in the Royal Engineers. He was afterwards transferred to the Royal Regiment of the artillery, and afterwards to the Rifle Brigade of which he is still Colonel-in-Chief. Whilst still a subaltern, Prince Arthur, as he was then, served in 1870 during the Fenian Raid into Canada in that year, and he wears the medal and clasp for this service. The Duke is no carpet knight. He commanded the Brigade of Guards during the Egyptian war, and was present at the battle of Tel-el-Kebir, and was three times mentioned in despatches, and was thanked by Parliament for his services on that occasion. After having served in other high positions in the army in various parts of the Empire, he recently visited South Africa as the King's representative and opened the first Union Parliament there.

We entirely agree with *The Times*, which says that this appointment will be received with the warmest appreciation both

in England and in the Dominion, and we agree with the remark that the appointment was appropriately made public on the day when His Royal Highness accepted the recognition of the city of London for the great service he had rendered to the Empire by his visit to South Africa. The success of that tour is a proof of the qualities which the Duke and Duchess will bring to the discharge of their duties in this Dominion, and we may rest assured that the same public spirit and unfailing tact which the Duke has shewn in other places will not be wanting in the important position which he is about to occupy, and we may be glad that one so wise and tactful as the Duke has shewn himself to be will represent our Sovereign in this important period of the Dominion's history.

*LEGAL REFORMS.**

I have been asked to speak to you upon the subject of "Legal Reform." In the first place I desire to congratulate you upon the fact that there is comparatively little in this favoured land calling for reform. When one reads the reports of meetings of bodies akin to this in other lands and reads the periodical literature of the profession one comes to realise that we are not face to face with many problems that confront other countries.

There is no congestion of business in our courts. Cases can be tried as soon as ready for trial. There are no arrears in any of our courts, either trial or appellate. Appeals can be heard practically as soon as they are set down, and speaking generally there is no delay between hearing and judgment. That this is so in all our courts from the court of first instance to the court of last resort, indicates that as a whole our system is well balanced and efficient. "Some Measure of Law Reform" has become a political phrase, used with the view of influencing votes, in many instances, by those with little knowledge of the real working of our courts, and, when reduced from mere generality to the con-

*Address delivered by Hon. Mr. Justice Middleton, at the Annual Meeting of the Ontario Bar Association.

crete, it is often found to mean little more than a general recasting of the machinery of the courts, and heretofore has not brought forth much real fruit. Speaking for myself, my short experience upon the Bench has not changed the view formed as the result of fairly active practice at the Bar, that a system that has been found to work well should not be radically changed, and that it would on the whole be better to endeavour to get rid of minor defects in the present system rather than to make any great change.

The administration of our criminal law, particularly in all cases of importance, leaves little to be desired. The limited right of review now permitted by the Code removes what was at one time a defect and substantial justice is now assured.

Yet the proceedings in magistrates' courts often miscarry. Technical errors, at one time, made it almost impossible to sustain any proceedings in the magistrates' courts. The magistrate was still surrounded by the necessity of technical accuracy which survived from the old common law days. The power to amend and sustain convictions when guilt is clear and there is no real miscarriage is a great advance. Yet too many convictions are still quashed and I would submit that the law might well be amended so that in all cases in which a conviction cannot now be sustained by reason of some error not falling within the saving and curative sections of the Code the courts should be given power to order a new trial, so that the guilty may not escape by the error or even stupidity of a magistrate.

This, however, is a minor matter. I desire to place in the forefront of suggested reform the need of a change in the law with regard to Workmen's Compensation.

Common law, said to be "the last result of human wisdom acting upon human experience for the public benefit" and to be "founded on the charities of religion, in the philosophy of nature, in the truths of history and the experience of common life," has admittedly proved inadequate.

We have for long had a "Workmen's Compensation Act" in some respects modifying the common law, and practically

all countries where the common law prevails have some special legislation dealing with the subject. In some countries the legislation is far-reaching and radical, in others by no means drastic. The common law obligation of the master has been thus defined: "The common law implies a contract between a master and servant whereby the former undertakes through himself or his agents to use reasonable care to furnish and maintain suitable and safe places, machinery and appliances for the work to be done, to hire competent servants and to warn the servants of all dangers of the work known to him and not known to the servant; and the latter undertakes to assume the risk of injury arising from the dangers of the work which he knows or ought to know and the risk of injury caused by the negligence of all other servants in the common employment."

I will not say the law is unjust—it is the result of the searching of able and righteous men after justice. According to common law ideas it has always been the law even though that fact was only ascertained in 1837, when *Priestly* v. *Fowler* was decided. The main defect in the law is that negligence of the employee, the negligence of the fellow-servant and the "voluntary assumption of risk," leave many a man disabled and with no right to recover—a burden upon the community. In the event of his disablement or death the community must care for him and his family. The master has not been in fault in any way, and the common law relieves him. It is not in the public interest that the man and his family should be placed in this position.

I cannot discuss the matter in all its bearings in the short time at my disposal. The great concurrence of opinion among those who have thought upon the subject is that the risk of carelessness either of the man or his fellow-servant resulting in injury ought to be borne by the industry. The industry has to bear the risk of machinery proving defective and of machines being injured by careless workmen. Why should it not bear the risk of workmen being careless and injuring themselves and others. There must be a certain number of accidents

in any industry—let the making of some reasonable compensation be a charge on the industry. Let the common law stand, if the master be negligent let him make compensation—give indemnity to the extent of the common law liability. In other cases let the industry bear as part of its cost, some fair sum, small enough to prevent any suspicion of the voluntary incurring of an injury, small enough to be no premium on carelessness, yet sufficient to prevent the man being a charge upon society. Society at large must pay as the cost of production will to some extent be increased, but the loss will fall where it should, upon the consumer of the article produced.

The problem as to how this can be borne by the master is not easy. The fairest way would be to levy an assessment on the factory. This would represent accident insurance and the funds so raised should be administered by a board which should adjust all claims. This would obviate the difficulty now arising from employee's accident insurance, when the company defends all actions in the master's name and the amount paid in premiums to a large extent is used in law costs, expenses of the administration of the company and shareholders' profits. This will also enable the master to know the exact amount required to meet his liability as a factor of cost and prevent the ruin of the small manufacturer by an accident.

It might be right that the wage-earner should contribute to this form of accident insurance and the public might well contribute, as they would be relieved to a large extent of the burden of the unfortunate and the expense of litigation which is by no means inconsiderable. The working out of any scheme in detail must of necessity require great care, and full advantage should be taken of what has already been done in other lands. The report of a special committee of the New York Bar Association presented at the annual meeting this year, and the summary of the laws of Germany, Austria, France and England accompanying it, will be found of value, as will also the English government report of 1904 on the working of the English Act of 1897.

Akin to this question is a wider and more difficult one. Is our law with reference to contributory negligence reasonable and fair? This sounds like questioning the very foundation of our jurisprudence, You know that in civil law when there is an accident resulting from the negligence of both parties the loss is apportioned. The same law is administered by my brother Garrow when he deals with maritime cases. But in our courts if both plaintiff and defendant are negligent there can be no recovery. (I am leaving out of sight cases of ultimate negligence). If sailing on the lake there is a collision as the result of the negligence of both parties and one vessel is injured and one escapes injury each has to bear its share of the total loss. If navigating the even more perilous highway an unfortunate by the joint negligence of himself and a motorman has a collision with a street car, the chances are that all the injury will be done to him and comparatively little to the car. Assume the fault to be equal, it seems unfair that he must bear all—yet such is our law. Is it certain that our law is as just as the civil law?

Another matter that I think calls for consideration is the speedy trial of serious criminal cases; cases that can only be heard before a High Court judge. Minor offences can now be dealt with speedily by the county judge, but an innocent man (or worse still a woman) may remain in gaol for several months before this case can be heard. While there should be no undue haste in the trial of these cases it is not in the public interest that there should be long delay.

The expert witness is always with us. His presence is most felt in accident cases and testamentary cases in which capacity is in issue. The evil of a witness who is in truth a paid advocate and who states not facts but opinion is manifest. He was upon my list as a possible subject for reform. In many of the States there is some attempt to reach the difficulty by legislation mostly along the line of having a board of experts nominated, one or more of whom is to assist the court by his evidence. Among medical men the evil is admitted but the remedy suggested is a medical assessor to sit with the Judge.

I have had the opportunity of reading Mr. Justice Riddell's paper read to the Medical Association and am convinced that he is right and any real remedy must come from within the medical body itself. Medical men should be taught the true office and function of a witness, and with regard to cases dealing with testamentary capacity should learn what the courts have given as the standard of capacity and, accepting that, attempt to aid in the solution of the question before the court rather than to confuse by giving evidence based upon some other than the accepted legal definition.

Then there is the question whether the right of appeal upon questions of fact should not be restricted.

Courts exist to ascertain and determine the rights of the parties, that is their primary purpose. This is answered by determining what the facts are and what the law applicable to the facts found is. The finding of fact is of importance to the parties and the parties only. The finding of law is of importance not only to the parties but also to the community as a whole. The court declares what the law is and this binds the whole community and therefore it is of importance that the law should be rightly declared and there should be freedom of appeal. The finding of fact is confined in its operations to the parties and while it is of great importance that it should be right the importance is confined to the parties and the parties only. There is and can be no assurance that the finding of fact by an appellate court will in any great number of cases be any nearer the truth than the finding of the court of original jurisdiction. One appeal upon questions of fact ought to suffice. A second appeal seldom has any beneficial result and the expense becomes a factor of great importance. In the classification of appealable and non-appealable matters this seems to me to be a satisfactory line to draw.

With regard to procedure, I have few suggestions. I submit that the scope of originating notices might well be enlarged. At present they afford a satisfactory way of determining questions that arise in the administration of estates. Many other questions could readily be dealt with in a summary way.

Then there should be some summary way of determining questions arising upon titles without having the whole title quieted. The Vendors and Purchasers Act is not satisfactory as the order only binds as between the vendor and purchaser and does not determine the right as against any adverse claimant. The originating notice might well be made to apply to this.

A standard form of insurance policy for accident insurance and employees' fidelity insurance is urgently required. At present the policies are often so cumbered with provisos as to be as meaningless as an old-time fire insurance policy. When any departure from a normal and fair policy is desired then departure should be made plainly evident to the insured.

A standard form of bond should be prescribed as necessary for all municipal and school treasurers and other similar officers. The bonds now given by surety companies are so conditioned as to prevent recovery in many instances.

The Insurance Act might well contain some similar provision as to the bonds to be given by the treasurers of all fraternal bodies, and all bonds by such treasurers and municipal officers should be filed in some central public office.

The sale of land under execution is now conducted in a manner well devised to produce the minimum amount. A fair advertisement stating the description of the property and the exact interest to be sold should be required. This might well be settled by the Master who might have the same discretion as to the kind of publication necessary as in sales in his office.

Tax sales also produce less than they ought as the uncertainty of a tax title is proverbial. Could not a measure be devised by which all preliminary steps should be proved before the municipal board whose finding should be final?

In a similar way would it not be well to require that all municipal debentures should be passed by that board, and when so vouched for should not be subject to attack in the hands of any bona fide holder.

And lastly, there is great need for the establishment of houses of refuge for the destitute, in the districts. There is

provision for them in counties, but in the new country there is no haven for the destitute but the gaol. This is not as it should be, and when one finds old men and women committed time and again as vagrants—the only offence being poverty—it seems to me there is something wrong. Why should not the districts assume some share of the burden?

These suggestions I make with much diffidence. They are suggestions only. Care is necessary if any of them are to be worked out. Probably you will see fit to consign them to the last resting place of so many presentments of the "Grand Inquest"—the pigeon-hole—or they may perchance only be destined for the waste paper basket.

THE ENGLISH LANGUAGE FOR ENGLAND'S PEOPLE.

There is no part of our heritage as Britons which should be as highly prized, as closely cherished, as carefully guarded, as our English tongue.

In it are enshrined the lessons of the past, guidance for the present, and assurance of hope for the future. It is the record of our life as a people from the beginning of our history. It tells of the glorious deeds of our forefathers—of their trials encountered, their sufferings endured, their victories won. Of these it is not for us to speak at present, but we may properly refer to the history it gives of the reign of law which from the time of our first great law-giver, the Saxon Alfred, has maintained its supremacy, and secured for all, small and great, rich and poor alike, the great blessings of freedom and justice.

We are led to this subject by the timely remarks of the Minister of Justice with reference to the change proposed in the title of the Hudson's Bay railway. It seems a small matter —merely the elision of a letter—but it is significant of the heedless and often reckless way in which our language is mutilated and debased. We quote the words of Sir Allen Aylesworth on the occasion referred to:—

"We Canadians should adhere to the English method of spelling, rather than that adopted in the United States. I do not desire to take up the time of this House with trifles, but this matter, in my opinion, is no trifle. There is a growing tendency in Canada to adopt the United States method of abbreviating the spelling of words by dropping out letters. The good, old, well-established English spelling should be maintained."

Sir Allen alluded to the fact that the "good old English spelling" was "Hudson's Bay," while the United States had adopted and amended the term in "Hudson River." He deplored the general tendency to follow American forms of spelling. "It is," said he, "the English language that we speak, and we look to England for our standards of orthography and geography. I believe that we in the Canadian Parliament, in all our official writings, do well to maintain that standard, whatever the newspapers or other people may see fit to do."

The suggestion of the Minister of Justice was unanimously adopted, and the bill in question amended accordingly.

It is unfortunate that so many of those who have it in their power to preserve in this country the purity and the beauty of the English language seem to prefer to do what they can to debase it. How many of our school teachers set an example of the use in common conversation of the rules which they teach or should teach in their classes? In works of fiction, of which so many are now being written for the perusal of the youth of this country, why do the writers think it appropriate to make the country people speak a language which certainly is not English, whatever else it may be, and which in point of fact they do not use in ordinary conversation? Why do they make the children going home from school talk to each other in the strange compound of Yankee slang and bad grammar which is no more English than Chocktaw? If the children attending our common schools do really talk the gibberish put into their mouths by the story-teller, then our system of education is wanting in one of its most important features. But the worst offenders of all, because the most widely read, are our daily newspapers.

We are heartily in accord with our Minister of Justice and hope that the members of our profession will do what they can to maintain the purity of the language in which they are perhaps more concerned than any other class of the community.

THE LAW SOCIETY OF UPPER CANADA.

The radical change affected by the Act of 1908 in the mode of electing Benchers of the Law Society by requiring nomination papers was suggested by us in 1901. The benefit of this suggestion has been recognized, and the election now about to take place will be under the provisions of the statute referred to. All details as to this new mode of election will be found in the Act of 1908, and will doubtless be supplemented by necessary papers from the Secretary of the Law Society.

In 1910 it was provided that there should be added to the ex officio Benchers any one who "shall have been elected under this Act (R.S.O. c. 172, s. 4, as amended by 63 Vict. c. 20, s. 1) as a Bencher by members of the Bar at four quinquennial elections." The names of those who have been thus added are as follows: Alex. Bruce, K.C., Z. A. Lash, K.C., C. H. Ritchie, K.C., G. F. Shepley, K.C., George H. Watson, K.C., and Donald Guthrie, K.C.

Public bodies do not always appreciate the services of those who work under them and this is as applicable to lawyers as to any other class in the community, but it is evident that the Benchers of the Law Society of Upper Canada recognize the eminent services of Dr. Hoyles, K.C., as Principal of the Law School of Ontario; a position which he has occupied for some 17 years. At a recent meeting of Convocation the following resolution was passed—"That a record be made in the minutes that Convocation expresses its high appreciation of the merits, qualifications and valuable services of Dr. Hoyles as Principal of the Law School, and that Convocation regards with satisfaction the present high standing of the Law School of the Law Society." It was also ordered that his salary should be

increased from $5,000 to $6,000 per annum and that this increase should date from the first of the year. We hasten to add our word of appreciation to this action of the Benchers; and we are confident that in doing so we voice the thought of the profession of Ontario as a whole in thus recognizing the excellent and faithful work done by Dr. Hoyles in the important position he occupies. It is fortunate that one so highly respected as well as one so learned and gifted as a teacher is in charge of the Law School.

THE ONTARIO BAR ASSOCIATION.

This Association held its Annual Meeting in Osgoode Hall on the 28th of December last; the retiring president, Mr. S. F. Lazier, presiding. There was an exceptionally large attendance partly owing doubtless to the expectation that papers would be read by the Minister of Justice, Mr. Justice Middleton, and others.

The important paper of the morning session was that of Mr. Justice Middleton on Law Reform, which our readers will be glad to have in extenso. It will be found elsewhere in this number. The event of the afternoon session was the address by the Minister of Justice on the subject of the Fisheries Award and the Hague Tribunal. Sir Allen jocularly explained that he was asked to read a paper on this important subject but that he had prepared no paper and had left any documents on the subject behind. Nevertheless he addressed the Association for two hours from memory, giving a most interesting and lucid explanation of the contentions of the United States and of the difficulties that arose in meeting these contentions, and of the successful issue of the matter in so far as it related to Canada. As the subject, however, has been so fully dealt with in the public press it would be merely repetition to reproduce his address here.

The President and others also addressed the Association and some interesting reports were submitted by various committees, but want of time prevented their discussion. They will doubtless be brought up at a future meeting.

The appointment of officers resulted in the election of the following:—

Hon. President, E. F. B. Johnston, K.C.; President, Charles Elliott; Vice-Presidents, W. C. Mikle, K.C., M. H. Ludwig, K.C., F. M. Field, K.C.; Recording Secretary, W. J. McWhinney, K.C.; Corresponding Secretary, A. J. Maclennan; Treasurer, George C. Campbell.

The Annual Banquet following the Annual Meeting was held in the evening at the National Club with a record attendance of 140, the retiring President, Mr. S. F. Lazier, K.C., presiding. The principal guests were Judge Clearwater, representing the Bar of New York State, Mr. R. C. Smith, K.C., of Montreal, representing the Bar of Quebec; Sir Thomas Moss, Chief Justice of Ontario, who responded to the toast to the Bench; Sir William Mulock, Hon. Mr. Justice Riddell, Hon. Allen Aylesworth, K.C., Minister of Justice; Hon. J. J. Foy, K.C., Attorney-General of Ontario, and others. The banquet was a great success. The speeches were of an exceptionally high order and the reply to the toast of the profession by Mr. R. C. Smith of Montreal was simply inimitable. It is no wonder that when delegates go from the Ontario Bar to different parts of the United States to similar festivities, Mr. Smith is spoken of as the after-dinner orator of Canada; he is perhaps the best on the Continent.

The efforts of this Association have been effectual in arousing a more active interest in the welfare of the profession generally, and in fostering a proper esprit de corps. It is to be hoped that this will continue in future and that much benefit will thereby accrue to the profession of this Province as a whole. We also trust that the members outside of Toronto will help on this good work by attending these meetings more largely, and by taking a more active interest in the work of the Association. The result of the recent meeting and banquet amply repaid those present for the time and money expended.

The apparently irrepressible Mr. Justice Grantham has again been much in the limelight. *The Times* says he was among the first, and it is to be hoped will be among the last, of the judges who choose to defend themselves publicly against charges of partisanship; and that "Certainly he is the first in recent times who has exposed himself to a rebuke such as that of the Prime Minister, who declared that Mr. Justice Grantham had signally violated the obligation of the Bench to abstain from criticism of the procedure at Parliament and had thereby created a unique situation." The same learned judge by his attack on Mr. Justice Channell brought upon himself a well-merited lesson from the latter, who told the grand jury at the Northampton Assizes that he did not think the charge of the grand jury was a very appropriate occasion for a judge to make remarks that went outside the calendar or were of a personal character. It has been said that the Premier's castigation might result in Mr. Justice Grantham's retirement from the Bench, but it may be as our contemporary hopes, that "we shall hear no more of an unfortunate demonstration by the judge—at all events that he will do nothing further to keep alive a controversy which ought for many reasons to end at this point."

We hear complaints that sufficient time is not given for the trial of cases on the Northern Circuit in the Province of Ontario. The increase of population in Northern Ontario and the fact that there is always a large amount of litigation in newly settled and in mining districts and mining camps, easily accounts for the congestion. Some re-arrangement of circuits would appear to be desirable:—in fact it would be well that a judge should, if possible, be appointed to clean up a mass of unfinished business.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

LANDLORD AND TENANT—DISTRESS—EXEMPTION—GOODS COMPRISED IN HIRE PURCHASE AGREEMENT—POSSESSION ORDER OR DISPOSITION—"REPUTED OWNERSHIP"—GOODS OF WIFE UNDER HIRE PURCHASE AGREEMENT—DISTRESS AMENDMENT ACT, 1908 (7 EDW. VII. c. 53) s. 4—(R.S.O. c. 170, s. 31).

In *Rogers* v. *Martin* (1911) 1 K.B. 19, a landlord having seized in distress a piano on the demised premises which the wife of the tenant had agreed to purchase on a hire purchase agreement, the vendors claimed the piano and the bailiff having refused to deliver it up the present action was brought. The Distress Amendment Act, 1908 (8 Edw. VII. c. 53) which exempts the goods of third persons from distress provides that such exemption is not to extend to the goods belonging to the husband or wife of the tenant, nor to goods comprised in any bill of sale, hire purchase agreement or settlement made by the tenant, nor to goods in the order and disposition of the tenant by the consent of the true owner under such circumstances that the tenant is the reputed owner. Following *Shenstone* v. *Freeman* (1910) 2 K.B. 84 (noted ante, vol. 46, p. 538), the Court of Appeal (Lord Alverstone, C.J., and Buckley, and Kennedy, L.JJ.) held that the piano was not subject to distress, the hire and purchase agreement not having been made by the tenant, and the piano could not be deemed to be in the "possession, order or disposition" of the tenant by the consent of the true owners in such circumstances as that he was "the reputed owner thereof." One other point is also decided. The statute requires that the claimant shall deliver a declaration of ownership to the bailiff, and the Court held that does not mean that a statutory declaration must be delivered, nor, where there are several joint owners, that all must sign the declaration.

LANDLORD AND TENANT—SUB-LESSOR AND SUB-LESSEE—COVENANTS TO REPAIR IN HEAD-LEASE AND SUB-LEASE—NEGLECT OF SUB-LESSEE TO REPAIR—DAMAGES FOR BREACH—COSTS.

In *Clare* v. *Dobson* (1911) 1 K.B. 35, the plaintiff was sub-lessor of the defendant; both the head and sub-lease contained covenants in identical terms to repair, and on the face of the sub-lease it appeared that the reversion was a leasehold reversion.

The premises were suffered to go out of repair; the head lessor notified the plaintiff and the plaintiff notified the defendant, but the defendant neglected to execute the repairs, whereupon the plaintiff's lessor commenced proceedings of ejectment, the plaintiff in the present action defended that action, the repairs were made and he then applied for relief from the forfeiture, which was granted on the terms of his paying £64 14s. taxed costs and he became liable also for £25 costs between solicitor and client and £10 10s. for surveyor's fees, these items he now claimed to recover from the defendant. Lord Coleridge, J. who tried the action, however, determined that the plaintiff could not succeed, and that on the authority of *Ebbets* v. *Conquest* (1895) 2 Ch. 377 in the absence of a covenant of indemnity, the damages recoverable for breach of a covenant to repair do not include costs paid to a third party to which the covenantee had been put in consequence of the default, nor his costs of proceedings to be relieved from the consequence of his own default.

CRIMINAL LAW—BETTING-HOUSE—USER OF PREMISES—EVIDENCE —RECEIPT OF MONEY—CONSIDERATION—BETTING ACT, 1853 (16-17 VICT. c. 119) ss. 1, 3—(9-10 EDW. VII. c. 10, s. 1 (D.)).

The King v. *Mortimer* (1911) 1 K.B. 70 was a prosecution for keeping a common betting-house. The defendant was convicted under the Betting Act, 1853 (see 9-10 Edw. VII. c. 10, s. 1 (D.)) of having used his premises for the purpose of receiving money thereat "as and for the consideration for certain assurances, undertakings, promises and agreements to pay thereafter" money on bets on horse races. The evidence shewed that the defendant was a bookmaker and at the time mentioned in the indictment postal orders for £5 were sent to the appellant at the premises in question and retained by him in pursuance of a letter previously received by defendant from the sender in which the latter stated he wished to open an account of £5, and that his commissions would not exceed that amount without a further remittance. To which the defendant replied sending a book of rules, etc., and subsequently sent the sender of the £5 an account of bets made and lost on his behalf. It was also shewn that a few days later the defendant's premises were searched by the police and betting slips and ledgers containing entries relating to bets were found there. The Court of Criminal Appeal (Lord Alverstone, C.J., and Pickford, and Coleridge, JJ.) held that the evidence was sufficient to warrant a conviction.

CRIMINAL LAW—QUARTER SESSIONS—POWER OF QUARTER SESSIONS TO BIND CONVICT TO APPEAR FOR SENTENCE—RECOGNIZANCE TO APPEAR FOR SENTENCE—BREACH OF CONDITION—INHERENT JURISDICTION OF QUARTER SESSIONS.

The King v. *Spratling* (1911) 1 K.B. 77 may be shortly noticed for the fact that the Court of Criminal Appeal (Lord Alverstone, C.J., and Pickford, and Coleridge, JJ.) held, on a case stated, that a court of quarter sessions has inherent jurisdiction to bind over a person convicted at the sessions, to appear for sentence when called on, and to inflict sentence in case of breach of the recognizance.

SOLICITOR—REGISTRAR OF COUNTY COURT—DEFENDANT IN PERSON—REGISTRAR ACTING AS DEFENDANT IN PERSON IN HIS OWN COURT—TAXATION BY REGISTRAR OF HIS OWN COSTS—COSTS OF SOLICITOR DEFENDANT ACTING IN PERSON.

Tolputt v. *Mole* (1911) 87 is an illustration of the exception to the general rule that a judge who has an interest in the result of a suit is disqualified from acting, the exception being "in cases of necessity where no other judge has jurisdiction." By the County Courts a registrar who is a solicitor is debarred from practising as a solicitor in his own court. In the present case the defendant was a solicitor and was registrar of the court in which he was sued. He appeared in person and successfully defended the action and was awarded costs, which as Registrar of the court be taxed. An appeal was had from his taxation on the ground that being himself the litigant he was debarred from acting as taxing officer of his own costs, and should have appointed a deputy, or requested the judge to tax the costs. The Divisional Court (Phillimore, and Avory JJ.) held that he was not under any obligation to incur the expense or obligation of getting any other person to act, and that he being the only officer having jurisdiction he was entitled to tax the costs himself. The case also deals with the question as to what items of costs a solicitor defendant is entitled to be allowed, where he acts in person.

COMPANY—FRAUDULENT PROMOTER—DEBENTURE ISSUE—SECRET PROFIT.

In re Darby (1911) 1 K.B. 95. When the limited company system was devised it was probably not anticipated that it would

be utilized so freely as it has been by fraudulent persons for preying on an unsuspecting public. This case affords another instance of that objectionable perversion of a beneficial Act. A corporation was formed by two persons named Darby and Gyde consisting of only the seven signatories of its memorandum of association nominated by these two persons, and the object was to cloak their identity in carrying out their fraudulent schemes, and they were the sole directors and managers of the corporation. This corporation contracted to buy for £3,500 a license to work a quarry, and Darby and Gyde then promoted another company to acquire the license, and a contract was entered into by means of a trustee for the company with the corporation whereby the latter agreed to sell the license to the company for £10,500 in cash, £2,000 in debentures and £5,500 in fully paid-up shares of the purchasing company. Darby and Gyde then caused the company to be registered, the signatories to its memorandum of association being stool pigeons furnished by themselves. The company duly adopted the contract with the corporation and Darby and Gyde prepared prospectuses which were issued to the public and debentures of the company were then sold realizing £14,060 out of which £9,200 on account of the purchase money was paid to the "corporation" and found its way into the hands of Darby and Gyde. The company as might naturally be expected was ordered to be wound up—assets £160. Darby having also become bankrupt the liquidator claimed to prove against his estate for the secret profit made by him by means of the sale of the license to the company. The trustee rejected the claim, but Phillimore, J., held that the corporation was merely another name for Darby and Gyde, and that Darby's estate was liable to account to the company for the secret profit he had made, less the reasonable costs and expenses of promoting the company.

EXECUTION—SHERIFF—"SHERIFFS' COSTS OF EXECUTION"—COSTS OF INTERPLEADER PROCEEDINGS.

In re Rogers (1911) 1 K.B. 104. In this case a sheriff was entitled under the Bankruptcy Act to be paid "his costs of execution" and the question was whether his costs of certain interpleader proceedings which had arisen out of the seizure were "costs of execution" and Phillimore, J., held that they were.

MARRIAGE SETTLEMENT—COVENANT BY HUSBAND TO SETTLE AFTER ACQUIRED PROPERTY—FURNITURE—AFTER ACQUIRED FURNITURE USED IN SETTLOR'S FAMILY—DELIVERY TO TRUSTEE.

In re Magnus (1910) 2 K.B. 1049, although a bankruptcy case deserves a brief notice, inasmuch as the Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ.) hold that where a husband covenants to settle after-acquired property, the customary and ordinary use of after-acquired furniture by the settlor and his family in the family residence in accordance with the trusts of the settlement is sufficient to vest the property in the trustee for the purposes of the settlement, without any formal delivery to him.

HABEAS CORPUS—FUGITIVE OFFENDER—DISCHARGE OF ORDER NISI FOR HABEAS CORPUS—"CRIMINAL MATTER"—APPEAL—RES JUDICATA—SUBSTANTIVE APPLICATION TO COURT OF APPEAL—FUGITIVE OFFENDERS ACT, 1881 (44-45 VICT. C. 69).

The King v. *Governor of Brixton Prison* (1910) 2 K.B. 1056. This was an appeal from an order discharging an order nisi for a habeas corpus obtained by the applicant under the Fugitive Offenders Act, 1881 (44-45 Vict. c. 69), with a view to obtaining his discharge from arrest. The Court of Appeal held that the matter was "a criminal matter" and therefore no appeal lay, but held, that as the order drawn up merely discharged the order nisi, there was no adjudication of record which would constitute the matter res judicata, consequently the refusal of the former application for an order nisi presented no obstacle to the making of a substantive application for a like order to the Court of Appeal, that court, and the High Court, having concurrent jurisdiction under the Act.

ILLEGALITY—GAMING—STREET BETTING—HOUSE USED FOR BETTING—SEIZURE IN HOUSE OF PROCEEDS OF BETS—ACTION TO RECOVER MONEY SEIZED BY POLICE.

Gordon v. *Chief Commissioner of Police* (1910) 2 K.B. 1080. The plaintiff in this case sought to recover from the defendant certain moneys which had been seized by the police in the following circumstances. The plaintiff engaged in betting on the street and deposited in a house occupied by one of his employees the proceeds of such betting operations. In pursuance of a

warrant issued under the Betting Act, 1853 (16-17 Vict. c. 119) s. 11, the police entered the house, and seized a number of betting slips, and the aforesaid money. The plaintiff's employee was convicted of keeping a common gaming house, but the plaintiff was acquitted. The plaintiff then claimed a return of the money, but the defendant claimed that it was forfeited under the Metropolitan Police Act, 1839, s. 48. Warrington, J., who tried the action, found that the money had not been forfeited as claimed, because the procedure required by s. 48 had not been complied with, but he held that inasmuch as the money had been acquired by bets in the street, which were illegal transactions, the maxim ex turpi causa non oritur actio applied, and the plaintiff therefore could not recover. The Court of Appeal (Williams, Moulton and Buckley, L.JJ.), however, were unable to agree in this conclusion, but, though they were agreed in the result, they were not agreed in their reasons. Williams, L.J., dissents from the views of Moulton, L.J., on the application of the maxim in question. Williams, L.J., appears to consider the rule would be applicable, but for the fact that there was really no evidence as to the circumstances in which the money in question had been received by the plaintiff. Whereas Moulton, L.J., thought the maxim had no application to such a case, because, in his view, although the betting by which the money was alleged to have been obtained might have been illegal, yet the property in the money passed to the plaintiff and any person from whom it had been obtained could not have claimed the specific coins, but would only have had an action of debt for its recovery. Buckley, L.J., on the other hand, thought the maxim is only applicable when the plaintiff cannot establish his cause of action without relying upon an illegal transaction, and here the plaintiff had the possession and property, and his case was exhaustively stated by saying he sued the defendant for having deprived him of the possession of his property.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Alberta.] LIMOGES *v.* SCRATCH. [Dec. 9, 1910.

Mechanics' lien—Construction of statute—Alberta Mechanics' Lien Act—Building erected by lessee—Liability of owner.

Sec. 4 of the Alberta Mechanics' Lien Act, 6 Edw. VII. c. 21 gives to any contractor or material man furnishing labour or materials for a building at the request of the owner of the land a lien on such land for the value of such labour or materials. Sub-sec. 4 of s. 2 provides that the term "owner" shall extend to and include a person having any estate or interest "in the land upon or in respect of which the work is done or materials are placed or furnished at whose request and upon whose credit or on whose behalf or with whose privity or consent or for whose direct benefit any such work is done," etc. By s. 11 "every building . . . mentioned in the fourth section of this Act, constructed upon any lands with the knowledge of the owner or his authorized agent . . . shall be held to have been constructed at the request of such owner," unless the latter gives notice within three days after acquiring such knowledge that he will not be responsible. The lessee of land, as permitted by his lease, had buildings thereon pulled down and proceeded to erect others in their place, but was obliged to abandon the work before it was finished. The owner of the land was aware of the work being done but gave no notice disclaiming responsibility therefor. Mechanics' liens having been filed under the Act,

Held, that the interest of the owner in the land was subject to such liens.

Judgment appealed from varying that at the trial (2 Alta. L.R. 109) in favour of the lienholders, affirmed. Appeal dismissed with costs.

Perron, K.C., for appellant. *Bennett*, K.C., for respondent.

B.C.] [Dec. 9, 1910.

VANCOUVER, VICTORIA & EASTERN RY. CO. *v.* MCDONALD.

Railway—Right of way—Expropriation—Delay in notice to treat — Property injuriously affected — Compensation — Mandamus.

The approval and registration of plans, etc., of the located area of the right-of-way, under the provisions of the Railway Act, and the subsequent construction and operation of the line of railway along such area, do not render the railway company liable to mandamus ordering the expropriation of a portion of the lands shewn within such area which have not been physically occupied by the permanent way as constructed. FITZPATRICK, C.J. and DAVIES, J., dissenting.

Appeal allowed with costs.

Ewart, K.C., for appellant. *G. E. Martin*, for respondent.

Exch. Court.] [Dec. 23, 1910.

CAP ROUGE PIER CO. *v.* DUCHESNAY.

Prescription—Interruption — Acknowledgment of title — Uncertainty.

The appellants claimed prescriptive title of a part of the bed of a small river on which D., the respondents' auteur, was a riparian owner. D. had leased lands on the banks of the river to the appellants which, it was alleged, included the property in dispute. In answer to the claim of prescriptive title the respondents produced, as their only evidence of interruption of prescription, a letter from the appellants to D. enclosing a cheque in payment of "use of your interest in Cap Rouge River this year," indorsed by D. acknowledging receipt of the funds "with the understanding that the navigation of the river is not to be prevented."

Held, reversing the judgment appealed from, 13 Ex. C.R. 116, GIROUARD and IDINGTON, JJ., dissenting, that as D. had an interest in other portions of the river, the memorandum was too indefinite to serve as an interruptive acknowledgment defeating the title claimed by the appellants. Appeal allowed with costs.

G. G. Stuart, K.C., for appellants. *Flynn*, K.C., and *Paquet*, for respondents. *Arthur Fitzpatrick*, for Trans. Railway Commissioners.

Province of Ontario.

HIGH COURT OF JUSTICE.

Middleton, J.] LOVEJOY *v.* MERCER. [Jan. 6.

Judgment by consent—Mistake as to date—Power of court to relieve from.

This was a motion by the defendant for an order relieving him from the consequences of default in making a payment on a certain date under a judgment pronounced by consent of counsel at the hearing. This judgment was intended to place the rights of the parties upon a definite basis and the date for the payment of a certain sum of money was fixed. There was a clear misunderstanding by the defendant as to this date, he thinking the amount was not payable for some time after the date mentioned in the judgment. There was no fraud or misleading on the part of the plaintiff and nothing in his conduct upon which any equity could be raised against it.

MIDDLETON, J.:—I am satisfied that the defendant has erred in good faith, and that he should be relieved if I have power. The oft-quoted words of Ferguson, J., in *Re Gabourie*, 12 P.R. 252, 254, "to do justice in the particular case, where there is discretion, is above all other considerations," are not widely, if at all, different from is said by Halsbury, L.C., in *South African Territories Co.* v. *Wallington*, [1898] A.C. 313, 314.

Neale v. *Lady Gordon Lennox*, [1902] A.C. 465, I think, gives me the same power in this case to relieve the defendant from his slip as I would have to relieve from a slip or default in the course of an action—and the same principle should guide me in the exercise of that discretion. . . .

The plaintiff here used the aid of the court, by its process, to restore him to the possession of his own land, free from the possession of the defendant, taken under the original agreement and held under the terms of the consent judgment. I cannot see that in assuming that I now have a power to relieve, upon proper terms, I am really carrying this case (the *Neale* case) beyond its due application. I place the exercise of this discretion on the power to relieve against mistakes, slips, blunders, and even stupidity of parties in the course of litigation, which I regard as quite distinct from the power assumed by equity to relieve from default under a foreclosure decree.

Had a motion been made by the defendant for an extension of time to pay the money by the date he had, by his contract, fixed for payment, upon the ground that he was then unable to meet his obligation, I could not have helped him, nor would he have had any equity in his favour. His accidental misunderstanding of the date fixed for payment is another matter.

Order made upon terms relieving the defendant from the consequences of his default.

McBrayne, K.C., for defendant. *Schelter*, K.C., for plaintiff.

Falconbridge, C.J.K.B., Latchford, J., Riddell, J.] [Jan. 7.

MICKLEBOROUGH *v.* STRATHY.

Landlord and tenant—Lease—Surrender by act of parties and operation of law—Intention.

Appeal by plaintiff from judgment by TEETZEL, J., 21 O.L.R. 259, dimissing the action and allowing defendant's counterclaim. The action was for a declaration that a certain lease had been determined by the acts of the defendant and that the plaintiffs were no longer liable for rent. The counterclaim was for rent.

Held; that in order that the lease shall be surrendered by operation of law there must be a resumption of possession by a landlord through himself or his (new) tenant; that there is no difference in the effect of a landlord himself going into possession and of a new tenant obtaining possession; and that, aside from unequivocal acts, there must be on the part of a landlord an intention to take possession and put an end to the lease, *i.e.*, no longer "to hold the tenant to his lease" (*Oustler* v. *Henderson*, 2 Q.B.D. at p. 578); and that the taking possession for a limited time of two rooms by a landlord is not one of those unequivocal acts, but the effect of such an act depends on the intention (or not) "to hold the tenant to his lease."

A. C. McMaster, for plaintiff. *Geo. Bell*, K.C., for defendant.

Province of Quebec.

SUPERIOR COURT—MONTREAL.

Charbonneau, J.] [February 1.

MONTREAL LIGHT, HEAT & POWER CO. AND ROYAL ELECTRIC CO. *v.* TOWN OF MAISONNEUVE AND DOMINION LIGHT, HEAT & POWER CO.

Electric power company having poles and wires installed on streets cannot be interfered with by another such company —Extent of interference—Inconvenience and danger.

The petition of the Montreal Light, Heat & Power Company alleged that on October 19, 1910, it presented a petition praying for an interlocutory injunction against the Town of Maisonneuve and the Dominion Light, Heat & Power Company, to prevent them, among other things, from placing their poles, wires and other electrical apparatus at a distance of less than six feet from the poles, wires and other electrical apparatus of the petitioners: that its petition was continued to the following day and an order was given by the court stopping all work, pending the adjournment; that on October 20, this order of statu quo was continued until November 18, and that on this date the court granted the interlocutory injunction asked for, fixing the distance at three feet; that notwithstanding the statu quo so ordered and notwithstanding the said judgment, the respondent the Dominion Light, Heat & Power Company erected a series of poles on Orleans Ave., north of Ontario St., from the west side of the said avenue, which poles are not only placed at a distance of less than three feet from the electrical apparatus of the petitioner, but have been actually placed in the middle of the petitioner's electric wires, and in such close proximity to these wires that it has been found necessary to fasten them to insulators, placed on the respondent's poles, in order to prevent the wires from touching the poles. The petitioners asked in consequence that the respondents should be declared in contempt of court, as well for having violated the terms of the interim injunction ordering the statu quo to be preserved, as for having violated the interlocutory order of injunction given as aforesaid and asking also that an order should be given that the said poles and wires should be removed within a time to be fixed by the court, and that in default

of the respondents removing the said poles, the petitioners should be authorized to do so at their expense, and that moreover the respondents should be condemned to a fine for the said contravention. A rule was accordingly issued by order of this court against the Dominion Light, Heat & Power Company.

Upon the contestation of the said rule the Dominion Light, Heat & Power Company alleged that it had not violated the terms of the interim order nor of the interlocutory injunction of November 18, 1910: that it is true that it had caused to be erected certain poles upon the street in question, but that these poles are more than three feet from the petitioners' wires and that six of these poles have been placed between the electric wires of the petitioner by reason of the fact that on Orleans Ave. the petitioners, as well as the Montreal Street Railway Company have, on each side of the street, lines of poles carrying electric wires of which the last are scarcely twenty feet from the ground; that this did not leave the respondents any alternative other than to place its poles as it had done; that to avoid the dangers of contact it was necessary to attach certain of the petitioners' wires to the poles in question by means of insulators, but that this work was done with care and absolutely prevents all danger; that the respondent had acted in good faith, not believing that it was violating the terms of the interlocutory injunction, nor of the order for the statu quo.

The petition of the respondents also asked that the terms of the interlocutory injunction of the 18th November last, should be modified in such a way as to permit the respondents to leave the said poles located at a distance of less than three feet from the electric wires of the company petitioner in view of the measures taken by the company respondent to protect the said wires, and to remove every element of danger.

Held, 1. The mode of installation which the Court is asked to authorize constitutes a very considerable inconvenience to the company petitioner and a permanent source of danger to its apparatus and also to the public.

2. The right conferred upon the company respondent to instal its apparatus in the streets of the town of Maisonneuve is subject to the rights acquired previously by the company petitioner, and among these rights so acquired is necessarily included the localization of its apparatus made previous to the respondent's charter.

3. It has not been shewn that it was absolutely necessary

to place the poles in question through the petitioner's wires to permit the company respondent to install its service on Orleans Ave.; but on the contrary the same end could have been obtained by several different modes of construction not affording the inconvenience and dangers above indicated.

4. It is impossible to permit the superplacing of an aerial line of wires charged with electricity over another line, belonging to a different company, without at the same time authorizing one of the two lines to make use of the apparatus of the other company, or establishing a method of joint use of the same apparatus.

5. This Court has not the power to order this kind of partnership, or to create a servitude upon the wires and apparatus of the other company.

The application of the respondent was dismissed with costs; and the Dominion Light, Heat & Power Co. was ordered to pay the Crown a fine of $100, and to remove the wires and poles installed on Orleans Ave. through the wires of the Company respondent, within fifteen days from the present judgment and that in default, the company petitioner was authorized to do so at the expense of the respondent—the whole with costs.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] DIMOCK *v.* GRAHAM. [Jan. 31.

Municipal elections—Preparation of lists—Striking off parties in arrears for taxes—Procedure—Names inadvertently omitted—Evidence on trial—Improper rejection of.

The list of voters prepared under the provisions of the Nova Scotia Franchise Act, R.S. 1900, ch. 4, is prima facie the list to be used (R.S. 1900, c. 71, s. 71, as amended by N.S. Acts of 1907, c. 56, s. 1), in the holding of town elections for mayor and councillors, but is to be corrected by striking out therefrom "by scoring with red ink" the names of persons who are in arrears for taxes.

The only evidence as to whether a person is so in arrears or not is the rate book and where the town clerk finds there the

name of a person who has not paid his taxes it is his duty to strike it from the list of voters to be delivered to the presiding officer for the purposes of the election.

It is a wrong view of the statute to strike from such list the names of persons whose names are not to be found on the rate or poll books of the town.

Where the result of an election is attacked it is not necessary for the person attacking it to shew that the persons whose names were struck off attempted to poll their votes and were prevented from doing so.

Persons whose names are so struck off are not within the provision (s. 131 (2)) providing for application to the town clerk for the insertion of names inadvertently left off.

Where on the trial of a controverted town election the trial judge rejected evidence which would have shewn how many of the persons struck off by the clerk were delinquents with respect to the payment of their taxes.

Held, that the case must go back to enable the petitioner to shew that the persons whose names were so struck off were not delinquents.

Per RUSSELL, J., the election having been run on lists which were shewn to have been made upon a wrong principle should be declared void.

J. M. Cameron, for appeal. *Lovett*, K.C., contra.

Full Court.] REX. *v.* OGILVIE. [Feb. 4.

Intoxicating liquors—Evidence of sale—Partnership—Presumption of knowledge—Parties—Non-joinder.

Where a quantity of liquor proved to be intoxicating was delivered by a teamster in the employ of defendant and the firm of which he was a member to a customer of the firm and the books of the firm and the accounts rendered shewed the sale although the customer testified that he had nothing to do with defendant personally,

Held, 1. reversing the judgment of the County Court judge for District No. 7 and restoring the conviction, that the evidence was sufficient to support the conviction.

2. Each member of a firm is presumed to know what is entered in the books of the firm and of money payments made to it.

3. The non-joinder of one member of a firm in a prosecution

for a violation of the provisions of the Liquor License Act is immaterial, the penalty being several.

J. McK. Cameron, for appeal. *O'Connor,* K.C., contra.

Full Court.] SHAND *v.* POWER. [Feb. 4.

Vendor and purchaser—Option—Entry after expiry of time—Ejectment—Recovery in.

Defendant, the holder of a legal title to property of which plaintiff was in possession under an agreement to purchase, entered and took possession after the expiration of the period allowed by the agreement for payment of the purchase money for default of payment. Plaintiff brought an action claiming damages for trespass and for acts amounting to an assault alleged to have been committed in connection with the entry and taking possession, but on the trial failed to give evidence of the alleged assault. Defendant counterclaimed in ejectment under the terms of the agreement.

Held, that defendant being the holder of the legal title and entitled to immediate possession should have had judgment on his counterclaim and that the judgment of the trial judge dismissing the counterclaim must be reversed with costs.

J. J. Ritchie, K.C., for appeal. *Rowlings,* contra.

Full Court.] MCDONALD *v.* BAXTER. [Feb. 4.

Infant—Contract by—Substantial advantage—Warranty—Burden of proof as to.

Plaintiff, an infant, purchased a horse from defendant in the month of April, 1908, paid the purchase price and took delivery and used him for general farm and other work down to June, 1909, when he sought for the first time to rescind the contract of sale and to recover the purchase price on the grounds: (1) That the contract was not one for necessaries, and (2) that there was a breach of warranty as to the age, soundness and general capacity of the animal.

Held, dismissing plaintiff's application to set aside findings and for a new trial, that plaintiff having derived substantial advantage under the contract could not repudiate or rescind it.

The trial judge instructed the jury that the burden was on

plaintiff to prove that the warranty alleged was given and that if the evidence was equal on both sides plaintiff would have to fail and the jury having returned the answer, "evidence equally balanced,"

Held, that the trial judge was right in accepting this finding as a finding against plaintiff and in directing entry of judgment for defendant.

Power, K.C., for. *W. B. A. Ritchie,* K.C., and *Sangster,* contra.

Full Court.] RICHEY *v.* CITY OF SYDNEY. [Feb. 4.

Sales—Contract—Order of goods not included in contract—Price—How determined.

Plaintiff and defendant entered into a contract for the supply by the former to the latter of a quantity of sewer pipe of specified dimensions at an agreed price. Subsequently to the making of the contract plaintiff was requested to supply a quantity of pipe of a size not included in the contract but for which a price had been quoted in correspondence leading up to the making of the contract.

Held, affirming the judgment of the trial judge, that plaintiff was not bound to accept the price quoted for pipe not included in the contract but was entitled to recover the fair market price of the pipe supplied at the time the order was given.

McDonald, for defendant, appellant. *Mellish,* K.C., contra.

Full Court.] LEVINE *v.* SEBASTIAN. [Feb. 4.

Sale of goods—Agreement of third party to pay in certain event—Form of remedy—Action wrongly brought—Amendment.

In an action for goods sold and delivered, plaintiff's evidence shewed that the goods in question were sold to men employed on board of a steamer of which defendant was chief steward and that defendant's undertaking, if any, was to pay for the goods if the parties to whom they were sold remained on the vessel after she cleared from St. John, N.B., or to return the goods.

Held, affirming the judgment of the County Court judge assuming this to be the agreement, that defendant could only be held liable in damages for breach of his contract as bailee of the goods and not in the action as brought for goods sold and delivered.

Per DRYSDALE, J., the case was not one for amendment. RUSSELL, J., dissented as to the effect of the evidence.

J. J. Ritchie, K.C., and *R. H. Murray*, for appeal. *W. H. Thompson*, contra.

Longley, J.] THE KING *v.* NEILY. [Feb. 17.

Intoxicating liquors—Third offence—Certiorari refused.

On application for a writ of certiorari to remove a conviction for a third offence against the provisions of the Canada Temperance Act.

Held, refusing the application:

1. There is no substantial variation between a conviction which adjudges as a penalty imprisonment for two months and a warrant of commitment which directs the imprisonment of the party convicted for the period of two calendar months. If otherwise, the matter is clearly one for amendment, the period mentioned being clearly within the term for which imprisonment may be imposed.

2. Where the defendant has full opportunity of combating the validity of the previous convictions when the certificates are offered in evidence against him and fails to do so the court will not go behind the face of the proceedings as to the question of jurisdiction.

3. Following *R.* v. *Neilson*, unreported, s. 655 of the Code as amended by Acts of 1909, c. 9, is only applicable to charges of indictable offences under the Code s. 750 and is not applicable to proceedings under the Summary Convictions Act.

W. B. A. Ritchie, K.C., for applicant. *Roscoe*, K.C., contra.

Longley, J.] [Feb. 17.

BRAS D'OR LIME CO. *v.* DOMINION IRON & STEEL CO.

Waters and watercourses—Riparian proprietors—Easement—Revocation—Blasting operations.

An interest in the waters of a stream cannot be conveyed to the detriment of bona fide riparian proprietors even though the riparian title be subsequently obtained.

The permanent withdrawal by one proprietor from the waters of a stream of a considerable quantity of water for use in connection with the operation of its works is an illegal act

which will be restrained by the court and it is not necessary as a condition of obtaining relief that the proprietor complaining should shew that the withdrawal in question results in any immediate injury.

The fact that the one proprietor has assented during a period of from ten to fifteen years to the withdrawal of water by the other and has suffered a pipe line for that purpose to be laid across his land does not estop him from revoking the permission given and standing upon his legal rights although the court in such case will not grant an injunction unless it appears that such course is unavoidable. In the absence of formal notice of termination of the privilege given the bringing of the action will have that effect.

The right of one proprietor to take minerals from the land of another does not abridge in any way the right of the owner of the land to make use of the surface in any way that he sees fit and damages cannot be claimed or awarded because the manner in which the surface is used makes it more difficult or expensive to obtain access to the minerals.

The owner of a quarry will not be enjoined from carrying on blasting operations unless it is shewn that such operations are systematically carried on in a negligent, reckless and dangerous manner.

Rowlings, for plaintiff. *Crowe,* K.C., for defendant.

Province of Manitoba.

KING'S BENCH.

Prendergast, J.] GRAVES v. TENTLER. [Jan. 24.

Jurisdiction—Awards—Enforcing award against non-resident of province—Service of notice of motion out of jurisdiction—King's Bench Act, Rules 201, 773*—Finality of award—Reservation of matter for subsequent adjudication by arbitrator.*

The respondent, who was not a resident of the province, joined with the applicant in referring their disputes to an arbitrator residing in Winnipeg, agreed to abide by his award and afterwards submitted his case to the arbitrator. Having refused to obey the award, the applicant served him out of the

jurisdiction with a notice of motion, under Rule 773 of the King's Bench Act, to have the award made a judgment of the Court.

Held, that the service was authorized both by Rule 773 and also by Rule 201, and the court had jurisdiction to make the order asked for. *Rasch* v. *Wulford* (1904), 1 K.B. 118, distinguished.

In making his award, the arbitrator found against the respondent in respect of his claim to be credited with the amount of a cheque for $800, but reserved the right to allow that claim provided the respondent would produce proof of same satisfactory to the arbitrator within thirty days. The respondent made no attempt to avail himself of the opportunity thus given.

Held, that this reservation, being for the respondent's benefit, could properly be separated from the rest of the award without requiring a re-adjustment of the position of the parties, and that the whole award was not thereby vitiated, but should be enforced disregarding such reservation. *Johnson* v. *Latham*, 19 L.J.Q.B. 329, and *Tomlin* v. *Mayor of Fordwich*, 5 A. & E. 147, referred to.

Foley, for applicant. *Kemp*, for respondent.

Robson, J.] [Jan. 30.

DALZIEL *v.* HOMESEEKERS LAND AND COLONIZATION CO.

Vendors and purchasers—Specific performance—Cancellation of agreement of sale—Forfeiture—Repayment of moneys paid on account—Damages for breach of agreement to purchase.

A purchaser of land under an agreement who has paid some of the instalments provided for, but whose rights the vendor has unsuccessfully attempted to put an end to by notice of cancellation for default in payment of a subsequent instalment, may, in an action against the vendor claiming relief from the forfeiture of the money paid, be entitled to a return of such money; but, if the value of the land has diminished in the meantime, he should have his claim reduced by the amount of the damages caused to the vendor by his breach of the contract; that is, the amount by which the price agreed on exceeds the reduced value of the land.

Hansford, for plaintiff. *Sproule*, for defendants.

Robson, J.] SNIDER *v.* WEBSTER. [Jan. 30.

Vendor and purchaser—Damages for breach of covenant to convey land—Vendor's lien.

When a vendor of land has received the amount of the purchase price agreed on and covenanted to convey with a clear title within a time limited, the measure of damages in case of an absolute failure to convey the land is the amount of the consideration paid with interest, whether the land has increased or diminished in value in the meantime. Dart on Vendors and Purchasers, 801, and Mayne on Damages, 250, 251, followed.

That the consideration mentioned in the deed and acknowleged by the defendant to have been received was not actually cash, but only lands received in exchange at a valuation agreed on, makes no difference if such lands have actually been conveyed by the plaintiff to the defendant, and the plaintiff is also, in such a case, entitled to a lien on the lands so conveyed for the amount at which they were taken in the proposed exchange.

Ferguson, K.C., for plaintiff. *Galt,* K.C., for defendant.

Referee.] [Jan. 31.

WESTERN CANADA FLOUR MILLS CO. *v.* CANADIAN PACIFIC RY. CO.

Practice—Third party—Defendants' claim against, founded on tort.

The rules of court providing for a defendant bringing in a third party to contest the plaintiff's claim, Nos. 246 and 249 of the King's Bench Act, do not extend to a case in which the defendant's claim against the third party is founded on tort. The defendants, therefore, being called upon to account for a car load of wheat received from the plaintiffs to be shipped on their line, could not bring in, as third party to the action, another company which it was alleged had wrongfully got possession of the wheat and disposed of it. *Gagne* v. *Rainy River Lumber Co.,* 20 O.L.R. 433, followed.

Hamilton, for plaintiffs. *Curle,* for defendants. *Montague,* for third party.

Robson, J.] WILSON *v.* STUART. [Jan. 30.

Joint debtors—Effect of taking judgment against one of two or more.

Rule 585 of the King's Bench Act, as amended by s. 12 of c. 12, of 7 & 8 Edw. VII. permitting judgment to be signed

against such defendants as do not defend without prejudice to the right of the plaintiff to proceed with the action against any other defendant or defendants, in so far as it is intended to abrogate the old rule that, in an action against two or more joint debtors, taking judgment against one is a release of the other or others, must be construed strictly, and cannot be applied in a case in which the judgment was entered against a joint debtor who had actually entered a defence, although such defence was afterwards struck out for default in making discovery.

J. F. Fisher and *W. C. Hamilton*, for plaintiff. *A. H. S. Murray*, for defendants.

Province of British Columbia.

COURT OF APPEAL.

Full Court.] CUDDY *v.* CAMERON. [Jan. 27.

Agreement—Construction of—Set-off for deficiency to be decided—Arbitration condition precedent to right of action.

In an agreement between the parties for the purchase and sale of a logging plant, one of the provisions was:

"The said parties of the first part further guarantee that the balance of the assets of the said company . . . are truly and correctly set forth in the said schedule, and if upon investigation and examination it turns out that the said assets or any of them are not forthcoming and cannot be delivered, the value of said deficiency shall be estimated by three arbitrators . . . and the amount of the award of the said arbitrators shall, in the manner hereinbefore mentioned, be deducted from the said purchase money still owing and unpaid under this agreement."

Held, on appeal (affirming the judgment of CLEMENT, J., at the trial), that the holding of an arbitration to determine any deficiency was a condition precedent to the claiming of any set-off against the purchase price.

L. G. McPhillips, K.C., for appellant. *Davis*, K.C., for respondent.

[Jan. 27.

FAKKEMA *v.* BROOKS SCANLON O'BRIEN COMPANY.

Master and servant—Injury—Defective system—Voluntary acceptance of risk—Common employment—Verdict of common law or under Employer's Liability Act.

Plaintiff's duty in a logging camp was to work a donkey-engine intended to extricate logs which might become jammed or stopped in their progress down a long chute leading to the water. The engine was placed near the water and close to the foot of the chute, down which the logs came with considerable speed. There was a foreman in charge of the logging operations, and plaintiff was subject to the directions of such foreman. The latter had made two changes in the position of the engine within a few days, the place it occupied at the time of the accident being the first location. There was no dispute as to the foreman's fitness. A log coming down jumped the chute and, striking the plaintiff, broke his leg and carried him into the sea.

Held, following *Ainslie Mining and Ry. Co.* v. *McDougall* (1909), 42 S.C.R. 420, that the system was defective, and that the verdict of the jury giving common law damages should stand.

Observations per MARTIN, J., as to desirableness of submitting questions to the jury in negligence actions.

Bodwell, K.C., for appellant. *Woodworth,* and *Smith,* for respondent.

Book Reviews.

The Examination of Witnesses in Court, adapted for the use of English readers, and revised to date. By FREDERIC JOHN WROTTESLEY. London: Sweet & Maxwell, 3 Chancery Lane. 1910.

This very interesting book is founded on the "Art of winning cases," by Henry Hardwicke of the New York Bar, and the "Advocate," by Edward W. Cox, Serjeant-at-law.

Mr. Wrottesley, in view of the difference in practice between the two countries, abandoned an attempt to adopt part of Mr. Hardwicke's book relating to discovery, etc., and gives instead a general sketch of the manner in which evidence, documentary or otherwise, is obtained from any opponent before the

trial. So far as questions of policy and rules of conduct of advocates are concerned he leaves the text of Mr. Hardwicke's book practically untouched. The subject is dealt with in the following chapters: I. Preliminary step (diverse, interrogatories, advising on evidence, etc.); II. Examinations in chief; III. Cross-examinations; IV. Re-examinations; V. Elementary rules of evidence.

Many books have been written in reference to the general subject matter treated in the one before us, but none of them are more interesting and instructive. After all, however, it is only experience that can be of much practical benefit to counsel in the discharge of their delicate duties in court.

Whilst every one of the 170 pages is as pleasant reading as any novel, we might recommend to our readers one extract among numberless others from the advice given by that most accomplished of all advocates, Sir James Scarlett, as to how best to deal with witnesses to be found on pp. 147 and 148.

This name reminds us of an incident which was related many years ago. Scarlett and Brougham were on opposite sides once on the Northern circuit. After the assizes two countrymen, who had been on the jury panel, discussed the relative merits of these two great lawyers in the conduct of a case. One thought Scarlett was the best, but his friend preferred his opponent, stating his opinion in words to this effect:—"Brougham's my man. He seems unfortunate in being always on the wrong side of the case and Scarlett has the easy side, but I like Brougham for he fights so hard for his client." Scarlett won his cases by his suaviter in modo, which was more efficacious than Brougham's fortiter in re. Our young friends may well apply the moral of this incident to the conduct of their cases.

A Selection of Legal Maxims, classified and illustrated. By HERBERT BROOM, LL.D. 8th edition by JOSEPH GERALD PEASE and HERBERT CHITTY, Barristers-at-law. London: Sweet & Maxwell, Limited, 3 Chancery Lane. 1911.

Little need be said of this standard work, most interesting reading as we all know, quite apart from its value as a book of law. The original was published in 1854, and at once became an established text-book for legal students. Five editions were produced by Dr. Broom himself; the seventh was published in 1900 and now we have the eighth. This one incorporates a selec-

ted number of recent decisions and enactments which bear upon the principal matters discussed under the various maxims, which of course gives additional value to this edition. It does not, however, pretend to be a new book; in fact any attempt in that line may well be expected to be a failure.

The Marriage Laws of the British Empire. By W. P. EVERSLEY, Recorder of Sudbury and W. F. CRAIES, Barrister-at-law. London: Stevens & Haynes, Law Publishers, Bell Yard, Temple Bar. 1910.

Several books have appeared recently with reference to marriage laws and divorce matters. The one before us is a short practical treatise devoted to the elucidation of the law of marriage (1) in England, Ireland and Scotland; (2) in the various British possessions in all parts of the world. The principle adopted by the authors is firstly to discuss impediments to marriage, and then to set out what are the essentials of a good marriage, irrespective of the religious belief of the contracting parties, referring also to the subject of registration. This takes up Parts I. and II. of the book. Part III. gives the statutory law applicable to the British Isles. Part IV. deals with marriage laws in the British possessions.

This is not a place to moralize on the subject, but one cannot, in looking at the list of these possessions, but be struck with the immense number of them, and the consequent vastness of the British Empire. Nor can one wonder at the desire of so many for closer imperialistic relations between these various dependencies of the Crown. One can also be excused for a feeling of pity, if not contempt, for those who do not appreciate the glory as well as the responsibility of belonging to such a vast Empire—one which could not be so great were it not that some great mission for good has been given it by an overruling Providence.

Just a word, however, as to the typographical arrangement of this excellent work. Parts I. and II., which refer specially to the British Isles, are in large type. Part III., giving the statutes, is properly in smaller type. Part IV., relating to the marriage laws of British possessions, though editorial matter, is also in small type. Why so? To be consistent it ought to be the same as Parts I. and II. Further, the type used in the headings and sub-heads used in this part is very confusing. It is

unnecessary to particularize, but this will be evident to any one accustomed to book-making. We have no doubt a second edition will within a reasonably short time be required, and attention to these minor matters will doubtless be given.

Digest of Law of Discovery with Practice Notes. By His Honour Judge Bray. 2nd edition. Sweet & Maxwell, 3 Chancery Lane, and Stevens & Sons, 119 Chancery Lane. 1910.

This volume is a concise statement of the leading principles affecting matters of discovery, in a form which enables the practitioner to follow these principles more readily than if he had to hunt for them in rules and scattered notes. Every practitioner should have this book as a matter of ready reference.

Workmen's Compensation Act, 1906, *with notes, rules, orders and regulations.* By W. Addington Willis, LL.B. 11th edition. London: Butterworth & Co., Bell Yard, and Shaw and Sons, Fetter Lane. 1910.

The author states that he has referred to some 360 new cases (including a few County Court decisions) thus bringing the authorities down to Nov. 1st, 1910. The fact of this book having reached the eleventh edition is a sufficient indication of what the profession think of it.

Law Societies.

COUNTY OF HASTINGS LAW ASSOCIATION.

The following officers were elected for 1911:—Hon. President, W. N. Ponton, K.C.; President, F. E. O'Flynn; Vice-President, J. F. Wills, K.C.; Treasurer, P. McL. Forin; Secretary, M. Wright; Curator, W. C. Mickel, K.C.; Trustees, E. J. Butler, E. G. Porter, K.C., W. B. Northrup, K.C., W. N. Ponton, K.C., and M. Wright.

A vote of thanks was passed to the retiring president Col. W. N. Ponton, K.C., who has most ably filled the office for the past six years. The gift of a portrait of Judge E. B. Fraleck to the library was suitably acknowledged. Nearly 200 volumes have been added to the library shelves.

Flotsam and Jetsam.

We are quite sure that the police magistrate of the city of Toronto, himself a lawyer, and therefore, he may think, quite competent to judge of his brethren, which he does very freely, will be glad to note for future reference when the occasion offers the following (probably aprocryphal) incident. "You have a pretty tough-looking lot of customers to dispose of this morning, haven't you?" remarked a friend of a police magistrate who had dropped in at the Police Court. "Huh!" rejoined the dispenser of justice, "you are looking at the wrong bunch. Those are the lawyers."

Dr. Johnson's famous talk with Boswell on the ethics of advocacy contains this passage: "What means may a lawyer legitimately use to get on? Nice questions of casuistry arise. 'A gentleman,' says Boswell, 'told me that a countryman of his and mine, Wedderburn afterwards Lord Loughborough—who had arisen to eminence in the law, had when first making his way solicited him to get him employed in city causes. Johnson: 'Sir, it is wrong to stir up lawsuits; but when once it is certain that a lawsuit is to go on, there is nothing wrong in a lawyer's endeavouring that he shall have the benefit rather than another.' Boswell: 'You would not solicit employment, sir, if you were a lawyer?' Johnson: 'No, sir; but not because I should think it wrong, but because I should disdain it. However, I would not have a lawyer to be wanting to himself in using fair means. I would have him to inject a little hint now and then to prevent his being overlooked.' "—*Case and Comment.*

RULES OF COURT—ONTARIO.

We are notified that a typographical error occurs in the copies of the rules distributed to the profession. The word "other" in Schedule A, paragraph 4, should read "outer."

Canada Law Journal.

VOL. XLVII. TORONTO, MARCH 15. No. 6.

UNDUE INFLUENCE.

The case of *Finn* v. *St. Vincent de Paul Hospital*, 22 O.L.R. 381, recently before the High Court on appeal from a judgment of the County Court of the United Counties of Leeds and Grenville, presents some peculiar features.

The facts of the case were as follows. Paschal Finn, the husband of the plaintiff, had been for a number of years prior to his death a pauper inmate of the St. Vincent de Paul Hospital, a Roman Catholic institution at Brockville. The only property Finn possessed was a beneficiary certificate issued by the Catholic Order of Foresters. According to the rules of the Society, it would appear that Finn was precluded from bequeathing or transferring the certificate to the hospital, which he was desirous of doing. In order to get over this difficulty, according to the evidence, Finn conceived the curious idea that what he could not do directly, he could do indirectly, by getting married and leaving a widow on whom the certificate would devolve, and who should undertake to give half the money to the hospital. Before communicating this idea to the priest in attendance at the hospital, he is said to have proposed to the plaintiff, and secured the acceptance of her hand on these conditions; and having thus completed the bargain he desired his spiritual adviser to tie the matrimonial knot. Naturally the proposal struck the reverend gentleman with astonishment, as poor Finn was near his end, and, in fact, as the event proved, on his death-bed. It had, as he said, a commercial look and he did not care to perform the ceremony, but after due consideration, he came to the conclusion that as Finn had a right to marry, it was his duty to marry him if he so desired, which duty he accordingly performed. After

the ceremony, he said to the bridegroom, "I understand that it is your wish and intention that $500 of your insurance money goes to your wife and $500 to the hospital," to which he answered, "Yes," and then turning to the bride, he said, "You understand what is to be done," to which she replied, "Yes." Nothing therefore could be clearer than the terms on which the plaintiff had secured a husband and the prospective right to his money. The marriage took place on the 25th January, and three days afterwards the bridegroom died, and the bride of barely three days became a widow. The object of the marriage having been so speedily attained, in order to carry out the bargain between the widow and her deceased husband, she was induced to give a power of attorney to a solicitor, who was summoned by the Mother Superior of the hospital, empowering him to collect the money and pay one half to the plaintiff, and the other half to the hospital. After she had done this the widow seems to have repented of her generosity, and brought the action to recover the $500 which she had directed to be paid to the hospital.

The County Court judge dismissed her action, but the Divisional Court decided, on the authority of a great many cases, that the power of attorney had been obtained in circumstances which amounted to undue influence, the solicitor in fact being the solicitor of the hospital authorities, and paid by them, and the plaintiff having no independent advice, and having been moreover exhorted by the priest "to do her duty and not damn her soul for money," which the plaintiff declared had the effect of scaring her into executing the power of attorney.

The power was therefore declared void so far as it authorized the payment to the hospital. The ante-nuptial contract was also declared to be void under the Statute of Frauds for want of writing. Mr. Finn's ingenious efforts to benefit his benefactors therefore failed.

MUNICIPAL GOVERNMENT BY COMMISSION.

It seems to be very generally admitted in these latter days that the advantages of municipal government so far as cities are concerned are more than counterbalanced by various disadvantages and the impossibility of securing the services of men of the high standing in the business world necessary for the important duties devolving upon them in the solution of the many difficult questions constantly coming before them. As a result the suggestion for government by commission is rapidly gaining favour.

Legislation to this end may appear very shortly in the statute books of some of the Provinces of the Dominion. We are told by *Case and Comment* that this idea is likely to receive wider hospitality in the Western States of the Union to the south of us than at any previous time. It is said that the Illinois legislature passed an enabling Act last spring, and as a result twenty-five cities in that State are preparing to vote on the question. At least a half-dozen cities in Michigan are on the same road, and about all the cities in Kansas not now under the commission plan are making ready to adopt it. Nor is the movement confined to the Mississippi valley. Practically every city in western New York, it is said, will be asking next winter for new rule charters, with the commission as the underlying idea.

This subject is referred to incidentally in a review in the *Nation* of Mr. Bryce's book, "The American Commonwealth." And the extract we quote reflects the thought of that great authority on this important question. The writer says:—

"States like Oklahoma and Oregon, to name the two most advanced, have met the malady of machine-politics by a virtual deposition of representative government, securing to 'the people' by means of the Referendum, Initiative, and Recall, full powers of legislation and a veto on all important acts of the executive. While many States are moving along this road towards 'primitive democracy,' as it has continually survived in the New England 'town meeting,' city government is moving in a

different direction by a swift series of equally bold changes. Here the central purpose is to place supreme control in a small Commission of able, honest, non-party men, for a considerable period of years, relying upon the concentrated responsibilty thus attained to secure efficient government and put down graft."

The condition of things in this country is as unsatisfactory as it appears to be in the United States. The scandalous and alarming state of things in the city of Toronto as regards its water supply is an illustration. Incompetence in the past and helplessness in the present has brought about a condition of things bordering on chaos, not only in reference to the water supply, but as to other public utility matters. And there is at present no remedy in sight for the inconvenience, injustice and injury resulting from the mismanagement so common in cities, arising partly from incompetence and partly from a susceptibility to improper and socialistic influences; all of which is evidence that this system of government is inappropriate to urban municipalities though in rural districts it seems to work fairly well.

OCULAR DEMONSTRATION.

It is an old saying that "seeing is believing," and of all methods of proof ocular demonstration has always been regarded as one of the most conclusive. But in applying this method of proof in ordinary litigation, difficulties arise, and particularly where the decision of one tribunal is liable to be reviewed by another, as it is obvious that unless the like demonstration is furnished to the appellate tribunal it is incapable of judging fairly of the weight proper to be attributed to all the evidence upon which the court below has proceeded.

In the proceedings for a view by a jury or a judge, provision has been made for the admission of this kind of evidence, and where that method of procedure has been resorted to an appellate court would be slow to review the finding of either a judge or a jury, based on an actual view, unless it also were en-

abled to have a view, which might in many cases be inconvenient or impossible. Rule 570 (Ontario) provides that a judge may inspect any property or thing, concerning which any question may arise in a case tried before him, or which comes before him on appeal. Rule 571 also provides for inspection by juries. In England it has been considered improper and unauthorized for a judge on the trial of an action of deceit to take a view of the property, on a question of colourable imitation—in that case the similarity of rival omnibuses was the point in question, and, of course, a couple of omnibuses would be hard to bring into court as exhibits; and it was held that the proper procedure was to take the evidence of witnesses: see *London General Omnibus Co.* v. *Lovell* (1907), 1 Ch. 135, and in an appeal from the High Court of Bombay, where an appellate court had at its own suggestion visited the locus in quo of an accident, which was the subject of the action, with the consent of the parties, and allowed an appeal, not on the evidence given at the trial, but on their own view of the facts derived from an inspection of the locality, it was held by the Judicial Committee of the Privy Council that the proceeding was irregular and the judgment based on it was reversed: *Kessowji Issur* v. *Great Indian Peninsular Ry.*, 96 L.T. 859. But the course which these cases condemn appears in Ontario to be expressly authorized by Rule 570 above referred to.

The practice of producing the offspring of an illicit intercourse in order to establish paternity was recently referred to by Mr. Justice Meredith: see *Rex* v. *Hughes*, 22 O.L.R., at p. 349, as being a practice unobjectionable in principle, notwithstanding the cold water thrown on it by Cameron, C.J., in delivering the judgment of the court in *Udy* v. *Stewart*, 10 Ont. 591: but it is quite apparent that unless the same evidence is adduced before an appellate court it has not before it all the evidence on which the court or jury have founded its verdict or judgment and are consequently to that extent not in the same position as the tribunal whose decision it is asked to review.

ADMINISTRATION OF JUSTICE IN ENGLAND AND UNITED STATES.

A writer in *Case and Comment* takes up the cudgels for the United States, in connection with a subject about which much has been said in that country, to the effect that the administration of justice is much more satisfactory in England than it is in the United States. This discussion is, of course, a little domestic matter of their own, but it is rather interesting reading to outside observers like ourselves. We confess that the article in our contemporary would rather lead an impartial observer to the conclusion that those in the United States who speak about "the superiority of English criminal procedure" and who have "written articles lauding the celerity of proceedings in English courts" are probably correct in their assertions to that effect. We note that this champion for his country makes no reference to the number of days that are often wasted in empanelling a jury, a procedure which often takes more time than the trial of the case; nor does he refer to what would be the strongest point for his contention as to the celerity of an administration in his country, viz., that the well-known jurist, Mr. Justice Lynch, is admittedly most prompt, both in trying a case and in executing sentence on the offender, in fact to ensure speed he generally omits the trial of the case. This certainly would be more to the point than the question which he asks of his fellow-countrymen who take the other side of the question—"Do the advocates of English methods think that there are no cases of *Jarndyce* v. *Jarndyce* still slumbering in Chancery?" Our readers need not be reminded that this dream of a novelist did not touch criminal procedure. Such an observation is about as much in point as his concluding argument that the "American" procedure must be the best, because the court rooms of that country are "better appointed and furnished in good taste," and are not "as cramped and stuffy as most of those in London. Many of them do not seem to be much larger than 20 x 20 feet and are poorly ventilated, dark and grimy." However, our friends can settle this little question among themselves without any assistance from outsiders.

LAW IN LABRADOR.

Among those who in all parts of the Empire are quietly and courageously, in the face of dangers and difficulties sufficient to daunt the stoutest heart, striving to do their duty to God and their country, asking no favours, and looking for no rewards, there is no man better entitled to the love and esteem of his countrymen than Wilfrid Grenfell, C.M.G., of the Labrador Deep Sea Mission. Faintly even to understand what manner of man he is, and how great are his services, we must try to realize the importance of his work, the extent of his labours, the dangers he continually encounters, and the lofty spirit by which he is animated. Missionary, physician, magistrate, providing for the material wants of his people while ministering to their spiritual needs, he may well be given a place among such men of renown as Cromer, Milner and Curzon. It is not, however, with the missionary or the physician or the man of business, who by his wise administration has secured for the poor fisherman some fair return for his risk or his labour, nor even with the hardy seaman who sails his tiny ship in the teeth of Arctic gales for hundreds of miles along the icy rock-bound coasts of Labrador and Newfoundland, guiding it on its way to succour the sick and feed the hungry, that we of this journal have to do—it is with the *magistrate* who over nearly a thousand miles of coast is almost the sole representative of law, and dispenser of justice, that we are concerned. In his capacity of justice of the peace, Dr. Grenfell has been as useful and as successful as he has been as preacher, doctor, man of business or sailor. He has settled disputes among neighbours, composed feuds of long standing, protected property when in danger, put an end to the illicit traffic in spirits, the greatest bane of the fishing community, and in all ways made the laws of the land not only respected, but obeyed.

With none of the usual machinery for enforcing his judgments, or even for the proper trying of a case, this magistrate was often driven to the use of very odd expedients. One of these we will let Dr. Grenfell describe in his own words:—

"As I was about to leave harbour in the night an appeal came for protection from assault from a quiet family man. I had perforce to try the case in the night. The cottage of the assailant was away by itself, and to go and get the prisoner and hear the case on board was out of the question. So collecting a special constable, the plaintiff, and some witnesses from their beds as we went along, we roused the prisoner and the court sat on a bench in his house and heard the case by the light of a ten cent tin lamp. The absolute nakedness of the house, not to say the ditto of the defendant, made one feel lenient. We had to dispense with one of the chief witnesses because half-dressed and half asleep he howled so unceasingly he prevented any progress. No jail to send any one to, no money to fine any one, no one after we sailed to see to the keeping of the peace, no one willing to go surety for good conduct. All these we found hindrances to the dignified administration of the law; as we did also a week later when a man whom we sought to try for breach of contract and refusing to work, simply took to the hills when he saw our heavyweight fisherman special toiling up the cliff after him. The fleetness of my Marconi operator saved the situation. He was able to outrace the fugitive, and by reasonable argument to persuade him to give himself up. Persuasion is better than force."

Many tales might be told of events connected with the administration of justice in remote places, and in early days, throughout what is now called Eastern Canada, in which the descent from the sublime to the ridiculous was by a very easy step. Some day a chronicler may be found who will relate these tales in a form which will be an interesting chapter in our history, but in that related above there is a pathos which gives it a character and distinction peculiar to itself.

APPEALS TO THE PRIVY COUNCIL AND SUPREME COURT.

By the rules and orders passed by the Judicial Committee, dated 21st December, 1908, it is provided by Rule 2, that "all appeals shall be brought either in pursuance of leave obtained from the court appealed from or, in the absence of such leave, in pursuance of special leave to appeal granted by His Majesty in Council upon a petition in that behalf presented by the intending appellant."

The Registrar of the Privy Council has, we are informed, advised the Registrar of the Court of Appeal for Ontario that the rule quoted is not intended to, in any way, interfere with what has been the practice heretofore on appeals from the Court of Appeal to the Privy Council.

As to appeals to the Supreme Court the Registrar of that court has also advised the same official that on appeals from the Court of Appeal to the Supreme Court of Canada appeal books printed as required by Rule 1305 of the Supreme Court of Judicature for Ontario will be accepted.

DEALING WITH CLIENT'S MONEY.

Our excellent contemporary *Case and Comment* has some good observations on the subject of dealing with client's money. We make some extracts which are as follows:—

The importance to a lawyer of the adoption of correct methods, and the formation and strict following of correct and safe habits of dealing with money coming into his hands, belonging to his clients, cannot be overestimated. Failure or laxity in this regard is liable to result in financial loss, in the loss of the confidence of his clients, or other members of his community who might otherwise become his clients, in possible prosecution and conviction for embezzlement or larceny, or, what is most serious of all, in his professional execution through proceedings for disbarment.

The retention by an attorney of money belonging to his client after demand therefor, or the fraudulent appropriation thereof to his own use, is universally regarded by the courts as sufficient ground for his disbarment. Nor is payment by the attorney after commencement of disbarment proceedings, of itself sufficient defence to the action, though it may in some cases be considered in mitigation of punishment. What is still more important, he may be disbarred though he used the money without actual intent to defraud his client, but in the hope of being able to pay it when demand should be made. And the fact that he has become unable to pay over the amount which he appropriated, because of the unexpected depreciation of securities deposited in a bank as collateral, is immaterial in an action for disbarment for the failure to promptly pay over the money belonging to a client.

In addition to disbarment, an attorney may be convicted of embezzlement or larceny, if he appropriates to his own use money belonging to his client, with intent to deprive the owner thereof, or without informing his client of his collection, or if he puts his client off with unfounded excuses. And he may be so convicted though the money remains in the bank in which he originally deposited it, though he acknowledges receipt of the money, or though he intended to replace it. And the demand by the client for payment is not a prerequisite to a conviction for larceny.

However, if an attorney withholds or uses his client's money without a wrongful intent—as, where he holds the money as a fund upon which he claims to have a lien for services, or believes, though mistakenly, that his client consented to his use of the money as a loan upon interest—he should be acquitted. This, it will be observed, is vastly different from the case of an attorney who misappropriates his client's money wrongfully, without any claim of right except the hope that he will be able to replace it before detection, which is the stock excuse, and probably, in the beginning, the actual belief of most embezzlers.

From the standpoint of civil liability, the failure of an

attorney to promptly pay over money due his client is a breach of implied contract, making him liable to an action in assumpsit, or, if he converts the money to his own use, to an action in trover or case. Or he may be compelled by a bill in equity to account for money collected.

While an attorney may be charged with interest on money he fails to pay over to the client, the cases fix different periods for which it is to be computed, such as from the time of demand or wrongful conversion, from the time it was actually collected, or for the time he used it. And though the Statute of Limitations will operate for the benefit of an attorney, the authorities are not agreed as to when it will begin to run, some holding that it runs from the time of demand, others from the time of collection, while still others hold that it runs from the time the client has notice of collection from the attorney, or other means of knowledge on his part that the money has been collected.

In the Code of Ethics adopted by the American Bar Association in 1909, this phase of a lawyer's duty to his client is stated in article 11, as follows: "Money of the client, or other trust property coming into the possession of the lawyer, should be reported promptly, and, except with the client's knowledge and consent, should not be commingled with his private property or be used by him." This brief but admirable statement, which is now in force in over one third of the States, would seem to afford a safe guide for the attorney in dealing with money belonging to his client, and strict adherence thereto will keep him free from the imputation of moral or professional dishonesty in this regard, though it will not necessarily insure him against financial loss in being obliged to replace money lost through the fault of others. To insure himself against the latter he should take the precautions required of any trustee.

A reference to the article of the Code of Ethics quoted above will shew that two distinct rules are there set forth to guide the conduct of the attorney. The first is to report promptly to the client the receipt of money. In addition to the ethical and professional duty involved, it is also the legal duty of an attor-

ney to give notice of collection to his client immediately, or at least within a reasonable time.

In addition to the moral and legal duty of the attorney to promptly report the collection of money, a little reflection will shew that the constant following of the practice will operate as a powerful restraint to the temptation so often felt by young lawyers who are necessarily living on the ragged edge of their resources most of the time, or of others who are living unnecessarily to the limit of their incomes, to use money coming into their hands to tide them over some temporary financial stringency which is no doubt frequently the beginning of a course of conduct which leads to serious results for the attorney.

It seems to be quite a general practice for attorneys to open general accounts as attorneys, or in trust, entirely separate from their private funds, in which is placed all money belonging to the clients. While it is likely that the placing of the client's money in a general fund of this kind, without designation of the particular beneficiaries, would not relieve the attorney from personal liability as debtor in case the fund was lost through failure of the depositary, yet such a course has the advantage of keeping the fund entirely separate, prevents it being used for personal purposes through accident or oversight, lessens the liability of the attorney to so use it intentionally, and insures him from the imputation of bad faith to which he is always liable if the funds of the client are commingled with his own.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

ADMIRALTY—TOWAGE CONTRACT—CLAIM OF TUG FOR SALVAGE OF TOW—BURDEN OF PROOF—COUNTERCLAIM FOR BREACH OF TOWAGE CONTRACT—CLAIM FOR SALVAGE BY OTHER TUGS OF SAME OWNER—CLAIMS OF MASTERS AND CREWS OF TUG ENGAGED AND OF OTHER TUGS OF SAME OWNERS.

The Maréchal Suchet (1911) P. 1. This was a claim for salvage, and a counterclaim for damages for breach of a towage contract. The circumstances being that the owners of a tug called the "Guiana" were employed to tow a sailing vessel. The tow ran aground. The owners failed to shew that this was due to any vis major or inevitable accident, or that there was no inefficiency in the tug, or want of skill on the part of the master and crew thereof. The vessel remained aground for four days during which the tug engaged to tow, and three other tugs of the same owners, and others came to her assistance. On the fourth day the vessel came off. Evans, P.P.D., held that the towing tug was not entitled in the circumstances to salvage and that it was not necessary to plead negligence in order to defeat this salvage claim. He also held that the owners of the towing tug were not entitled to salvage for the services rendered by their other tugs, as they had failed in their towage contract; as it was an implied term of the contract that the tug to be furnished should be reasonably sufficient for the work; and that the master and crew of the "Guiana" were not entitled to salvage because they performed no more than their "duties" in the towage service; but that the masters and crews of the other three tugs perform "engaged" services for which they were entitled to compensation. As regards the counterclaim, he held that there was no evidence of the inefficiency of the tug, and the point was left in doubt, and though it was necessary for the purpose of converting a towage claim into one for salvage that the owners of the tug employed, to tow should shew that their tug was efficient, it was, for the purpose of a counterclaim for breach of the towage contract, equally necessary for the plaintiffs by counterclaim to shew that the tug was inefficient, and that a special condition of the towage contract which provided that the owners of the tug were not to be responsible for damages resulting to the vessel while in tow, though not a ground for

converting the towage contract into a claim for salvage was, nevertheless, a good defence to a claim for damages for breach of the towing contract.

ADMIRALTY—TOWAGE CONTRACT—DEFECT IN TOWING GEAR—WARRANTY OF FITNESS OF TUG—EXEMPTIONS FROM LIABILITY—CONSTRUCTION.

The West Cock (1911) P. 23, was a claim for damages for breach of a towage contract. The contract provided that the defendants were not to be liable "for any damage to the ship they have contracted to tow from any perils or accidents of the seas, rivers, or navigation, collision, straining, or arising from towing gear (including consequence of defect therein or damage thereto) and whether the perils or things above mentioned or the loss or injury therefrom be occasioned by the negligence, default or error in judgment of the pilot, master, officers, engineers, crew, or other servants of the tug owners." The damage in question arose from the carrying away of the towing gear of the tug, due to the defective condition of the rivets attaching the towing gear of the tug to her bunker casing. This defect, Evans, P.P.D. held was not covered by the above conditions, which he held only applied to circumstances occurring after the commencement of, and during the towage, and not to a defect existing before the towage began, there being in his opinion an implied contract that at the commencement of the contract the tug and its equipment was reasonably sufficient for the work required to be done. In arriving at this conclusion the learned President relied on, and adopted, the reasoning of that "eminent tribunal" the Supreme Court of the United States in *The Caledonia* (1895) 157 U.S. 124, at p. 138.

SETTLEMENT—CONSTRUCTION—ANNUITY EXPRESSED TO BE PAYABLE OUT OF INCOME—GIFT OVER SUBJECT TO ANNUITY—IMPLIED CHARGE OF ANNUITY ON CORPUS.

In re Watkins, Wills v. *Spence* (1911) 1 Ch. 1. The point decided by the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) overruling Eady, J., in this case was simply this, that where by will an annuity is given to a person for life which is expressly directed to be paid out of income, and this is followed by a gift over of the corpus "subject thereto," the words "subject thereto" mean "subject to the annuity"

which constitutes the annuity an implied charge on the corpus. In arriving at this conclusion the Court of Appeal overruled the decision of Neville, J., In *Re Bigge* (1907) 1 Ch. 714 (see ante, vol. 43, p. 524).

PASSING OFF—"GET UP" OF GOODS—USEFUL COMBINATION—ARTICLE IN COMMON USE—INJUNCTION.

In *Edge* v. *Niccolls* (1911) 1 Ch. 5, the plaintiffs were manufacturers of blue and other dyes which they made up in porous bags with a little wooden stick inserted for the more convenient use of the dye without the necessity of staining the fingers of the user. For this device the plaintiffs had formerly obtained a patent, which had, however, been subsequently revoked—they had, however, continued to put up their goods in this way since 1891. In November, 1909, the defendants had registered as their own design a copy of the plaintiffs method of putting up their goods including the stick and were using it in the sale of their own goods and issuing notices calling attention thereto as being of their own registered design but their own names were on their goods. Eady, J., granted an interim injunction to restrain the defendants from imitating the "get up" of the plaintiffs, and from selling blue or dye "with the stick in it" as, or for the goods of the plaintiff. This order was reversed by the Court of Appeal (Cozens-Hardy, M.R., and Farwell, and Kennedy, L.JJ.), the Master of the Rolls remarking on the impropriety of going into such a mass of evidence on an interlocutory motion, 183 affidavits being filed in chief and 100 in reply. His Lordship also held that a mere useful part of an article as distinguished from a mere ornamental addition cannot be regarded as part of the get up of the article, that no length of exclusive use can entitle a man to a monoply in the manufacture and sale of a useful combination not protected by patent.

POWER OF APPOINTMENT—FRAUD ON POWER—BONA FIDE PURCHASER FROM APPOINTEE WITHOUT NOTICE—LEGAL TITLE—EQUITABLE TITLE.

Cloutte v. *Storey* (1911) 1 Ch. 18. This was an action by persons entitled to a fund in default of appointment to obtain a declaration, that an appointment which had been made was void as being a fraud on the power, in the following circumstances. By a marriage settlement a wife's reversionary interest in a fund of £25,000 was assigned to trustees for the

trusts of the settlement, inter alia for such of the children of the marriage as the husband and wife should appoint. There were seven children of the marriage, and while the interest was still in reversion the husband and wife by two separate deeds appointed the fund in favour of the eldest son and he assigned his reversionary interest in the fund thus appointed, part to Storey by way of mortgage and another part he sold to a company, and on both of these transactions he made statutory declarations that the appointment had been made for his "own unrestricted use and benefit," and that there was on neither occasion any direct or indirect bargain of any sort with his father or mother. As a matter of fact both appointments were made for the express purpose of enabling his father to obtain and he did in fact obtain the money thus raised by the son. The other children were plaintiffs and claimed that both appointments were void as frauds on the power. The assignee and mortgagee both set up the defence of purchaser for value without notice but Neville, J., decided and the Court of Appeal (Cozens-Hardy, M.R., and Farwell and Moulton, L.JJ.) agreed with him that as the mortgagee and assignee had only acquired an equitable title that defence was not available to them, though it would have been had they acquired a legal title. There had been previous litigation in reference to the fund commenced by a mortgagee of the wife's interest claiming relief against the trustees for a breach of trust to which the plaintiffs and other children were parties which had been compromised on terms which provided for the payment out of the fund of the claims of the mortgagee and assignees whose claims were now in question and the fund was brought into Court and carried to a separate account, and it was claimed that the plaintiffs were now estopped from disputing the claims of the assignee and mortgagee, but the Court held that in the construction of a deed of compromise of certain specific questions, it cannot be held to deprive the parties of any right not then in dispute, and not in contemplation of the parties to the deed, and the carrying of the fund to a particular account was merely the machinery of the Court which could be varied so long as the fund remained in the control of the Court, as the rights of parties might require.

POWER OF APPOINTMENT—EXERCISE OF POWER—APPOINTMENT TO OBJECT OF POWER, ON CONDITION OF APPOINTEE PAYING APPOINTOR'S DEBTS—FRAUD ON POWER.

In re Cohen, Brookes v. *Cohen* (1911) 1 Ch. 37. In this case the facts were, that the donee of a special power to appoint

his share under his father's will to his wife and children, in presumed exercise of the power appointed an annuity of £1,200 to his wife, and in case his residuary estate should prove insufficient for the payment of his debts, he directed that the trustees of his father's will should pay to his wife an additional annuity of £500 so long as any of his debts should remain unpaid or for a period of ten years from his death whichever should be the shorter period, and so long as she expended £400 every year in payment of his debts, and after the debts should be fully paid by her, or after the expiration of ten years whichever should be the shorter period, to pay her if she should have fulfilled the condition instead of the said additional £500 an additional annuity of £100 for her life and subject thereto he appointed the trust funds to his children. Joyce, J., who tried the action, came to the conclusion that though the condition imposed was not a condition precedent, and though the condition in favour of the payment of the appointor's debts applied to only part of the annuity appointed, yet that the appointment made for a purpose foreign to the power, and though there was no evidence of any bargain or prior agreement with the appointee, yet the condition could not be separated from the appointment, and he agreed with the statement in Farwell on Powers, p. 421: "The execution is fraudulent and void if made for purposes foreign to the power although such purposes are not communicated to the appointee previously to the appointment, and though the appointor received no personal benefit," and he held the appointment of the whole £500 was void.

PATENT—APPLICATION TO REVOKE PATENT FOR NON-MANUFACTURE IN UNITED KINGDOM—MANUFACTURE OF PATENTED ARTICLE BY INFRINGERS—PATENT ACT, 1907 (7 EDW. VII. C. 29) SS. 25, 27—(R.S.C. C. 69, S. 38).

In re Fiat Motors (1911) 1 Ch. 66. This was an appeal from the controller of patents. An application had been made to him under the Patent Act, 1907, s. 27 (see R.S.C. c. 69, s. 38), to revoke a patent for non-manufacture in England; and the single question on the appeal was whether or not the controller should take into consideration manufactures of the patented article in England by infringers of the patent, and Parker, J., decided that he should.

COMPANY—WINDING-UP — CONTRIBUTORY — CERTIFICATE THAT SHARES WERE FULLY PAID—ALLOTMENT TO PARTNERSHIP—PARTNER SIGNING CERTIFICATE AS DIRECTOR—ESTOPPEL—NOTICE.

In re Coasters (1911) 1 Ch. 86. In this case a firm of Clements, Knowling & Co. agreed to sell a ship to a company for £1,500, part of the consideration to be £1,000 of fully paid shares of the company. The transaction was varied and at the instance of Ellis, a promotor of the company, was carried out in the following way. Clements, Knowling & Co. mortgaged the vessel to one Constant for £1,000 which sum was paid to the company for £1,000 fully paid shares; no formal application for shares appears to have been made by Clements, Knowling & Co. The ship was transferred to the company subject to the mortgage. Without the knowledge or consent of Clements, Knowling & Co. or any of its members Ellis caused the £1,000 cash to be credited as a payment of 5s. per share on 4,000 shares for which he had applied. At a meeting of the directors the 4,000 shares, Nos. 791 to 4,790, were allotted to Ellis and he was entered on the register as owner thereof, and the purchase of the ship from Clements, Knowling & Co. for £500 subject to the mortgage was approved. Knowling, a member of the firm of Clements, Knowling & Co. was subsequently elected a director and a certificate was issued signed by him as a director certifying that his firm was the registered proprietor of £1,000 fully paid shares, Nos. 891 to 1,890. A similar certificate was on the same day issued to Ellis certifying him to be the owner of 4,000 fully paid shares numbered 791 to 4,790, and in the same month a transfer was executed by Ellis to Clements, Knowling & Co. for a nominal consideration of 1,000 fully paid shares numbered 891 to 1,890. This transfer was not dated but both certificates issued on 12th June. The company having been ordered to be wound up, Clements, Knowling & Co. were placed on the list of contributors for 15s. per share on the 1,000 shares held by them, and the question was, whether, in the circumstances, the company was estopped from disputing the certificate that the shares in question were fully paid, and it was contended on behalf of the liquidator that Knowling being one of the partners and also a director must be taken to have known that the shares were not in fact paid up, and that this constituted notice to his firm. Neville, J., who heard the application found that the firm had in perfect good faith paid over the £1,000 in respect of the 1,000 shares for which they had

contracted and had never in any way consented to or known of Ellis' diversion of the money, and that was all Knowling actually knew about the matter. The fact that Knowling was a director he considered did not prevent the company from being estopped by the certificate signed by him, there being no evidence that he had acted in collusion with Ellis. He thought the certificate was binding quite irrespective of the transfer from Ellis to the firm; and, in the absence of any evidence to the contrary, he thought Knowling might well have thought that the shares were issued to Ellis by mistake. He therefore struck the applicants' name off the list of contributories.

COMPANY—CONTRACT OF SERVICE—SALARY TO BE PAID OUT OF "PROFITS"—"PROFITS"—WINDING-UP—SURPLUS.

In re Spanish Prospecting Co. (1911) 1 Ch. 92. In this case an appeal was had from a decision of Eady, J. The point in controversy was comparatively simple. A claim for arrears of salary was made against a company in liquidation in the following circumstances. The claimants had been employed by the company at a fixed salary to be payable out of the "profits" of the company and not otherwise, but it was agreed that the salary was to be cumulative and that the arrears might from time to time be paid out of profits as they should accrue. In the voluntary liquidation the whole of the assets had been sold and sufficient realized to pay all creditors except the claimants to whom a sum of about £8,000 for arrears of salary was due, and the subscribed capital was returned to the shareholders in full leaving a balance of £3,328 which the claimants contended should be applied on account of their claim. Eady, J., came to the conclusion that this balance was not "profits" because at the date of the winding-up there appeared to be a debit balance of £270 on profit and loss, and that the £3,328 was the surplus of realized assets and not profits. From this conclusion the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) dissent, the surplus in question not being due to any new business carried on by the liquidator ought, in their opinion, properly to be carried to the credit of the profit and loss entirely irrespective of what appeared to be the state of that account at the date of the winding-up. Moulton, L.J., is of the opinion that "profits" are ascertainable by "a comparison of the assets of a business at two dates." He probably means "net assets" after deducting all liabilities, as it seems clear a mere comparison of gross assets would furnish no criterion for ascertaining profits.

WILL—LEGACY BY PARENT TO CHILD—INFANT—CONTINGENT GIFT—CONTINGENCY NOT REFERABLE TO LEGATEE ATTAINING MAJORITY—INTEREST—MAINTENANCE—SHARE OF RESIDUE.

In re Abrahams, Abrahams v. *Bendon* (1911) 1 Ch. 108. The facts of this case were, that a testator by his will bequeathed to each son living at his death who should attain the age of twenty-five years, £15,000, and a further sum of £15,000 to each son who should attain thirty years. He also directed his trustees to stand possessed of 3/14 parts of his net residuary estate in trust for his son Frank in case and when he attained 21 years, and provided that the said shares should not vest absolutely in him, but should be held in trust for him for life, and after his death in trust for his children. Frank was 13 when the testator died, in 1909. This was an application by the trustees to determine whether the two legacies of £15,000 to Frank carried interest and from what time. It was argued on behalf of the other parties interested in the estate that the gift of the share of the residue contingent on Frank attaining 21, the interest of which under s. 43 of the Conveyancing Act was available for his maintenance, was such a provision for his maintenance as would in any case preclude him from getting interest on the two contingent legacies of £15,000, but Eve, J., in deference to *Re Moody*, 5 Ch. D. 837, held that it was not; though, he said but for that decision, he would have held that it was. But on the main point he was of the opinion that the rule of the Court allowing interest on legacies to infants contingent on their attaining 21 when given by a parent or person in loco parentis, could not be extended to the gift of legacies given by a parent to a child, where the contingency, as in this case the attaining 25 and 30 years, had no reference to the infancy of the legatee.

WILL—DEVISE OF REAL ESTATE—TRUST TO APPLY NET RENTS IN DISCHARGE OF MORTGAGES—REMOTENESS—GIFT TO UNASCERTAINED CLASS—GIFT OF RESIDUE.

In re Bewick, Ryle v. *Ryle* (1911) 1 Ch. 116. In this case the rule against perpetuities was invoked. A testator had devised all his real estate to his executors upon trust to receive the rents, and after paying thereout rates, taxes, outgoings, and repairs, to pay off all mortgage charges existing on the real estate held by a certain building society or others, and upon trust after the mortgages were paid off to sell and divide the pro-

ceeds among his children then living, and he gave all his residuary estate to his children equally. At the time of his death in 1909, there were two mortgages on the realty, which if duly paid as they fell due according to their terms would be completely discharged in 1921 and 1927. The application was made to the Court claiming a declaration that the devise in trust to pay off the mortgages and then sell and divide the proceeds was void for remoteness as offending against the rule against perpetuities. Eve, J., said: "Unless I am satisfied that the mortgages must be paid off within the prescribed period, I do not see how I can hold the gift good. I think it is too remote, and the real estate therefore passes under the gift of residue."

EXPROPRIATION OF LAND—PARLIAMENTARY DEPOSIT—ABANDONMENT OF UNDERTAKING—COMPENSATION—COLLATERAL OBLIGATION—COVENANT TO BUILD EMBANKMENT—BREACH OF COVENANT NOT NECESSARY RESULT OF ABANDONMENT OF UNDERTAKING.

In re Southport and Lytham Tramroad Act (1911) 1 Ch. 120. In this case a company had been authorized by statute to construct a tramroad "with all proper and necessary embankments" and for that purpose to expropriate the necessary land, and they were required before obtaining the Act to deposit a sum of money as a security to landowners or other persons whose property had been interfered with or otherwise rendered less valuable by the commencement, construction, or abandonment of the tramroad. The company in pursuance of an agreement with one Hesketh, made before the passing of the Act, subsequently thereto, entered into an agreement with him by which he agreed to convey certain lands to the company and to grant to them by way of easement the right of constructing and maintaining an embankment to carry the tramroad across certain marsh lands of Hesketh; and the company agreed to construct and maintain the embankment and to form it so as to connect certain sea banks and to be sufficient to prevent the ingress of the tidal waters of the river over marsh land belonging to Hesketh. This agreement was followed by a conveyance by which the easement was granted to the company and which contained a covenant by the company to construct the embankment as agreed. Subsequently the company abandoned the project and the embankment was never built, and

the company was ordered to be wound up. Hesketh claimed to be paid out of the deposit, compensation for breach of the agreement to build the embankment as having caused a depreciation in the value of his land. Warrington, J., held he was entitled thereto; but the Court of Appeal (Buckley and Kennedy, L.JJ.) reversed his decision holding that the breach of this collateral agreement was not necessarily a result of the abandonment of the undertaking. As Kennedy, L.J., puts it: "The question is whether an embankment within the meaning of the covenant could not be constructed although the tramroad was not constructed. In my opinion it could." . . . "The abandonment of the tramroad did, no doubt, necessitate the abandonment of the embankment as an embankment carrying a tramway, but it did not necessitate the abandonment of the embankment in the sense of rendering it impossible to fulfil the covenant for such an embankment as would prevent the ingress of tidal water over the respondent's marsh land, and so increase the value of that land." The appeal was accordingly allowed.

COMPANY—DEBENTURES—GUARANTEE—RELEASE OF GUARANTOR —MAJORITY OF DEBENTURE HOLDERS BINDING DISSENTIENT.

Shaw v. *Royce* (1911) 1 Ch. 138. In this case the plaintiff was the holder of debentures in the defendant company, forming part of an issue secured by a trust deed, and guaranteed by the Law Guarantee Trust Co. which was the trustee. By the trust deed a sinking fund for the redemption of the debentures was to be established and the company was to pay the Trust Company 10s. per cent. on the amount of the outstanding debentures. A general meeting of the debenture holders was empowered to assent to any "arrangement or compromise" proposed to be made between the company and the debenture holders, provided it was one which the Court would have power to sanction under the Companies Arrangement Act, 1870, or any statutory modification thereof, if the company were being wound up, and the requisite majority at a meeting of debenture holders had assented thereto; and a resolution duly passed at a meeting of the debenture holders was to be binding on all debenture holders whether present or not at the meeting. The company was in voluntary liquidation, and at a meeting of debenture holders a resolution was passed releasing the guarantors the Trust Co. from the guarantee, increasing the interest of the debenture debt, and abolishing the sinking fund, and appoint-

ing new trustees of the deed, and a draft supplemental trust deed was prepared providing that the debenture holders should surrender their debentures, and accept new ones bearing the higher rate of interest, but no guarantee of the Trust Co. The plaintiff did not attend or assent to this arrangement, and brought this action for a declaration that he was not bound thereby, but Warrington, J., held that the arrangement was one which the debenture holders were competent to make and that the plaintiff was bound thereby, and the action therefore failed. In regard to the nature of the guarantee, he was of the opinion that though called a guarantee it was really in the nature of an insurance on which the company might have been liable to the debenture holders although the company might cease to pay the stipulated premiums.

FACTORY—EMPLOYMENT OF CHILDREN—PROHIBITION AGAINST CHILD CLEANING MACHINE IN MOTION—REMOVING BY-PRODUCT —FACTORY ACT, 1901 (1 EDW. VII. c. 22) s. 13—(R.S.O. c. 256, s. 14).

Taylor v. *Dawson* (1911) 1 K.B. 145 was a prosecution for breach of the Factory Act, 1901 (1 Edw. VII. c. 22) s. 13 (see R.S.O. c. 256, s. 14), which prohibits the employment of children to clean machinery in motion, the facts being that a child 12 years of age was employed by the defendants to watch a spinning machine and while in motion to remove from the rollers and top board certain fluff formed in the course of spinning. This fluff, if not removed, would clog and stop the machine; it was not mere refuse but had a saleable value. On a case stated by a magistrate a Divisional Court (Darling, and Pickford, JJ.) held that this constituted a breach of the Act for which the defendants might properly be convicted.

CRIMINAL LAW—TRIAL FOR MURDER—ILLNESS OF JURYMAN—TEMPORARY ABSENCE OF JUROR FROM COURT—CUSTODY OF JURY—REBUTTING EVIDENCE FOR PROSECUTION—ADMISSIBILITY.

The King v. *Crippen* (1911) 1 K.B. 149. This notorious case has furnished a legal precedent on two somewhat important points. (1) on the second day of the trial a juryman was taken ill and was taken out of court, but not out of the building, accompanied by two doctors and an usher to a part of the build-

ing to which the public had no access. After a consultation one of the doctors reported to the court when the juryman was likely to recover, and the court adjourned for a short time and the doctor was sworn to take care of the juror during the adjournment. He then returned to the juror and he and the other doctor, and the usher remained with him in the open air in rear of the courthouse enclosure for three-quarters of an hour, the usher having been with him the whole time he was absent from the rest of the jury. The usher had been sworn on the first day of the trial to take charge of the jury, but he was not sworn to take charge of the sick juror. During the whole time of the latter's absence no one spoke to him about the trial. The doctors spoke to him but no others. On the way to the open air less than a dozen persons had to be passed, but the juror was in a state of collapse and not able to communicate with anyone. The Court of Criminal Appeal (Darling, Channell, and Pickford, JJ.) held that these facts furnished no ground for quashing the conviction. (2) It was also urged on the prisoner's behalf that rebutting evidence admitted on behalf of the prosecution after the close of the defence was inadmissible; but the Court of Appeal held that was a matter of judicial discretion and that the exercise of such discretion would not be interfered with unless it was exercised in a way which obviously resulted in some injustice to the accused.

JUSTICE OF THE PEACE—INDICTABLE OFFENCE—EVIDENCE—WITNESS DANGEROUSLY ILL—DUTY OF MAGISTRATE AS TO TAKING DEPOSITIONS.

The King v. *Bros* (1911) 1 K.B. 159. This was an application against a magistrate calling on him to shew cause why he should not take the deposition of the applicant as a witness in support of a prosecution against the accused for an indictable offence. The applicant made affidavit that owing to illness he was unable to attend the Court and he claimed that the magistrate should attend at his residence to take his depositions. The magistrate objected on the ground that such applications were only entertained when made by a superior officer of the police, as it would otherwise interfere with the other proceedings of his Court. The Divisional Court (Darling, Pickford, and Coleridge, JJ.) considered that the magistrate had no right to lay down any such rule, and that in all cases of indictable offences,

if it is practicable he should go to the residence of the witness and that the question of whether it is practicable or not is for him to decide.

SALE OF GOODS—C.I.F. CONTRACT—"TERMS NET CASH"—RIGHT TO INSPECT GOODS BEFORE PAYMENT—PAYMENT ON PRODUCTION OF SHIPPING DOCUMENTS.

Biddell v. *E. C. Horst Co.* (1911) 1 K.B. 214 was an action to recover damages for breach of contract for sale of goods. Vaux & Co. had by writing agreed to buy a quantity of hops from the defendants in California, to be shipped to Sunderland, and it was agreed that the buyers "shall pay for the hops . . . c.i.f. to London, Liverpool or Hull; terms net cash." Vaux & Co., assigned the benefit of the contract to the plaintiffs. The defendants notified the plaintiffs that they would ship the goods and would draw on the plaintiff for the price at sight with "negotiable bills of lading and insurance certificate attached to draft," and also offered to attach certificates of quality of the merchant exchange of San Francisco. The plaintiffs then notified the defendants that they would not accept the certificates as to quality and declined to pay the bill until they had had an opportunity of inspecting the goods. On receipt of this information the defendants declined to forward the goods, and the action was brought—Hamilton, J., who tried it, came to the conclusion that on a cost insurance and freight contract such as this, it was well settled that the seller was entitled to payment of the price against the bill of lading and insurance certificate and that the buyer could not claim a right to inspect the goods as a condition precedent to payment. "A seller under a contract of sale containing such terms has firstly, to ship at the port of shipment goods of the description contained in the contract; secondly, to procure a contract of affreightment, under which the goods will be delivered at the destination contemplated in the contract; thirdly, to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer; fourthly, to make out an invoice as described by Blackburn, J., in *Ireland* v. *Livingston,* L.R. 5 H.L. at p. 406, or in similar form; and finally to tender these documents to the buyer, so that he may know what freight he has to pay and obtain delivery of the goods, if they arrive, or recover for their loss, if they are lost on the voyage.

Such terms constitute an agreement that the delivery of the goods, provided they are in conformity with the contract, shall be delivery on board ship at the port of shipment. It follows that against tender of these documents, the bill of lading, invoice and policy of insurance, which completes delivery in accordance with that agreement, the buyer must be ready and willing to pay the price. In this case payment before the arrival of the goods in this country was involved." But, notwithstanding this, the buyer's right to a reasonable opportunity to examine the goods was considered to remain unimpaired. The action therefore failed.

NEGLIGENCE—CAUSE OF ACTION—INJURA SINE DAMNO—TOWAGE—TOW SUNK BY NEGLIGENCE OF THIRD PARTY—LOSS OF TOWAGE.

La Société Anonyme de Remorquage v. *Bennetts* (1911), 1 K.B. 243. The question involved in this case was very simple. The plaintiffs' tug was under contract towing another vessel, when through the negligence of the defendants' vessel the tow was sunk, and the plaintiffs were unable to complete their contract, and they claimed to recover from the defendants the amount they had thus lost by reason of their non-completion of their towage contract. Hamilton, J., who tried the action, came to the conclusion that the plaintiff's loss of the profits of the contract of towage was not the direct consequence of the defendant's negligence, and therefore was not recoverable at law. In his opinion, it was a case of injuria sine damno. It would have been different if the tow itself had been damaged. The towage contract provided that "sea towage interrupted by accident to be paid pro rata of distance towed." This, the learned judge considered, gave the plaintiffs a right to recover on their contract against the owners of the lost vessel a pro rata proportion of the price agreed to be paid for towing.

CRIMINAL LAW—LARCENY—STEALING FIXTURES BY TENANT—TAKING POSSESSION WITH INTENT TO STEAL FIXTURES—LARCENY ACT, 1861 (24-25 VICT. C. 96) S. 31—(CR. CODE S. 372).

The King v. *Richards* (1911) 1 K.B. 260. In this case an appeal was had from a conviction for larceny in the following circumstances. The accused entered into an agreement with

one King, who was the lessee for a long term of years of fifteen dwelling houses, five of which were unoccupied and the rest being let to weekly tenants, whereby the accused was to have possession and to be entitled to the rents payable in respect thereof and he was within three months at his own cost to put the houses into substantial repair; and upon completion of the work he was to receive a lease of the premises for twenty years at a yearly rent, but if he failed to commence the repairs within seven days, King was to be entitled to re-enter and the agreement was thereupon to be determined. The repairs required to be done were papering, painting and whitewashing, but the accused when he went into possession removed and carried away zinc guttering and lead piping, iron stoves, flush tanks, and wood cisterns lined with zinc, all of which were in good repair. The Court of Criminal Appeal (Lord Alverstone, C.J. and Pickford, and Avery, JJ.) held that the accused had been properly convicted under the Larceny Act, 1861, s. 31 (see Cr. Code, sec. 372), following *Rex* v. *Munday*, 2 Leach C.C. 850.

SHIP — CHARTER-PARTY — CONSTRUCTION — "WORKING DAY"— CUSTOM OF PORT—"SURF DAY."

British & American Shipping Co. v. *Lockett* (1911) 1 K.B. 264. In this case a simple point of law was determined on a preliminary motion on the pleadings. The action was for demurrage by shipowners against assigns of a bill of lading of a cargo of lumber to be carried by the plaintiffs' ship from Vancouver to Iquique and there delivered to the charterers or their assigns on payment of freight "and all other conditions as per charter-party." The charter-party provided that "discharge was to be given with dispatch according to the custom of the port of discharge (but not less than thirty mills per working day) at such wharf, dock, or place as charterers or their agents shall designate." According to the custom at the port of Iquique vessels had to be unloaded by lighters which carry the cargo from the vessel to the beach, and the defendants set up that according to the custom of that port, days on which the surf is rough so as to prevent the operation of unloading vessels are called "surf days" and are not reckoned as working days and that taking such days into account there had been no delay—as on such days the defendants were not bound to take delivery:

and that whether a day is a "surf day" is determined by the captain of the port, who makes an entry to that effect in the register of the port, and which is considered binding on all vessels being unloaded there. Hamilton, J., held, that this being proved would not be a good defence in law, and that in the circumstances "surf days" were to be reckoned as "working days," but the Court of Appeal (Williams, Buckley, and Kennedy, L.JJ.) reversed his decision, being of the unanimous opinion that "surf days" were not to be reckoned as "working days," and that the alleged custom of the port to that effect was reasonable and one which was known to both parties and with reference to which they must be presumed to have contracted.

INFANT—APPRENTICESHIP DEED—COVENANT NOT TO PRACTISE WITHIN CERTAIN AREA AFTER APPRENTICESHIP CEASED—BREACH OF COVENANT—INJUNCTION.

Gadd v. *Thompson* (1911) 1 K.B. 304 was an action to restrain the defendant from committing a breach of a covenant contained in an apprenticeship deed, whereby the defendant being then an infant had bound himself to the plaintiff to learn the business of an architect and had covenanted not to practice as an architect within a specified area after the termination of his apprenticeship for a certain number of years. The action was tried in the County Court, and the Judge held that the covenant was fair and reasonable and that the deed was for the benefit of the apprentice and that he was bound by the covenant. On appeal to the Divisional Court (Phillimore and Coleridge, L.JJ.) it was held that though no action can be brought on a covenant in an apprenticeship deed against an infant, yet that rule only applies during the infancy of the covenantor, and that a covenant made by an infant, when fair and reasonable, may be enforced against the covenantor after he has ceased to be an infant. And it appearing that no architect in the town would accept a person as apprentice who refused to enter into a similar restrictive covenant, the covenant in question was held to be fair and reasonable and therefore enforceable by injunction.

BANKRUPTCY—LEAVE TO ISSUE EXECUTION—ORDER TO CONTINUE PROCEEDINGS—RULE 181—(ONT. RULE 396).

In re Bagley (1911) 1 K.B. 317, may be briefly noticed for the fact that the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) decided inter alia that where a judgment creditor becomes bankrupt, the trustee in bankruptcy may obtain leave to issue execution on the judgment, without first obtaining an order to continue the proceedings under Rule 181 (Ont. Rule 396) or otherwise making himself party to the action. The Court of Appeal had to consider two opposing dicta, that of Cotton, L.J., *In re Woodall*, 13 Q.B.D. 479, 483, and that of Wright, *In re Clements* (1901), 1 K.B. 260, 263, and while the Master of the Rolls and Moulton, L.J., preferred the former, Kennedy, L.J., intimated his preference for the dictum of Wright, J.

CRIMINAL LAW—PRACTICE—CONVICTION—ADMISSION BY PRISONER OF ANOTHER OFFENCE—REQUEST BY PRISONER TO COURT TO TAKE OTHER OFFENCE INTO ACCOUNT WHEN PASSING SENTENCE.

The King v. *McLean* (1911) 1 K.B. 332 was somewhat unusual in its circumstances. A prisoner was indicted and convicted for housebreaking, and he then requested the Judge in passing sentence to take into account a charge of arson for which he was to be tried in another county and to pass a sentence for both offences. The judge acceded to his request and passed a sentence of 3 years' penal servitude. This was done without consultation with the prosecutors in the other case which was duly brought on and tried and the prisoner was convicted before another judge, and a sentence of 5 years' penal servitude was passed. On appeal the court (Lord Alverstone, C.J., and Pickford and Avory, JJ.) discussed the practice to be pursued in such a case and came to the conclusion that where a prisoner convicted admits that he is also guilty of another offence of the same character as that for which he has been convicted the court may take both offences into account in passing sentence, but if there is a committal for the other offence the judge should ascertain whether the prosecution agrees that he should do so. If the committal is in another county and the

prosecution does not consent the judge should leave it to be dealt with in due course, and even if the prosecutors in that case do consent the judge should consider whether or not a separate investigation of the other crime should take place. But where the charge is of a different character in another county, the judge should not take it into consideration at all. In the present case the sentence was reduced to three years to run from the date of the first conviction.

PRACTICE — STRIKING OUT PLEADINGS — REASONABLE CAUSE OF ACTION—RELIEF AGAINST CROWN—DECLARATORY JUDGMENT—ATTORNEY-GENERAL DEFENDANT.

Dyson v. *Attorney-General* (1911) 1 K.B. 410. One effect of recent fiscal legislation in England has been that inquisitorial inquiries are made regarding property, and for the purpose of such inquiries forms are required to be filled up by property owners for the purpose of assessment. One of these forms was delivered to the plaintiff which he was required to fill up and return to "the appointed officer," within thirty days, the appointed officer being a village blacksmith at the plaintiff's place of residence and who, as the plaintiff alleged, was not in the employment of the Commissioners of Inland Revenue. The plaintiff desired to obtain a declaration that he was not bound to send the return to the blacksmith, and also that certain information demanded by the notice could not lawfully be required of him, and for that purpose the action was instituted. An application was made by the Attorney-General to strike out the statement of claim as disclosing no reasonable cause of action and Lush, J., affirmed an order made by the Master granting the application. The Court of Appeal (Cozens-Hardy, M.R., and Moulton, and Farwell, L.JJ.), however, held that the statement of claim raised a fair question and could not properly be struck out on a summary application and that the action was properly instituted against the Attorney-General as representing the Crown.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Full Court.] [Jan. 17.

ROSS *v.* TOWNSHIP OF LONDON.

Public Health Act—Employment of physician by local Board of Health.

Appeal by plaintff from the judgment of MEREDITH, C.J.C.P., 20 O.L.R. 578. The action was for a mandatory injunction directing the defendants, other than the corporation of the township of London, who were members of a local Board of Health, to issue an order for $2,300 in favour of the plaintiff, as payment for medical services in a small-pox outbreak in the township of London, and directing the township corporation to pay the same. The Board had issued an order for $350 for these services, but the plaintiff declined to receive that amount as in full of his demand. He claimed a larger sum under an alleged agreement made by him with the Board before the services began. This the defendants denied and the trial Judge found in favour of the defendants, so that if the plaintiff could recover it would have to be on a quantum meruit. The local Board of Health was not as such a party to the suit.

Held, 1. No order could be made against the individual members of the Board of Health who were co-defendants in the action. See R.S.O. 1897, s. 248, s. 48.

2. The Board being a quasi corporation might be sued and the plaintiff's remedy, if any, would be against the Board, notwithstanding s. 58 of the same Act.

3. There was no right of action against the township or corporation. It was not in default in any way. Appeal dismissed.

Johnston, K.C., and *McEvoy*, for plaintiff. *T. G. Meredith*, K.C., for defendants.

HIGH COURT OF JUSTICE.

Riddell, J.] [Feb. 3.

JONES *v.* TORONTO AND YORK RADIAL R.W. CO.

Negligence—Causal, contributory and ultimate negligence defined.

RIDDELL, J.:—The rules as to contributory and "ultimate" negligence are, it seems to me, based upon nothing more than the proposition that the fact that one acts negligently does not disentitle him to demand that others shall not be negligent toward him.

If, for example, one leave a donkey tied in the road, though that act be negligent or careless, others are not entitled to act negligently toward him or his property: *Davies* v. *Mann*, 10 M. & W. 548. And the inquiry must, in all cases in which both parties have been negligent, really be, what was the actual cause of the accident, as distinguished from a mere condition sine qua non?

Where "there has been negligence on the part of the plaintiff, yet, unless he might by the exercise of ordinary care have avoided the consequences of the defendants' negligence, he is entitled to recover:" per Parke, B., in *Budge* v. *Grand Trunk R.W. Co.*, 3 M. & W. 248; *Davies* v. *Mann*, 10 M. & W. 548, But, if he could by the exercise of ordinary care have avoided the consequences of the defendants' negligence, he cannot recover. If he continue his causal negligence up to the very moment of the accident, being able to discontinue it, and if the cessation of such negligence would have avoided all the consequences of the defendants' negligence, his negligence is the causal negligence, and he has no right of action. "The mischief is an instantaneous result of the operation of the joint negligence of the defendant and the plaintiff; in such cases no question of ultimate negligence arises:" per Anglin, J., in *Brenner* v. *Toronto R.W. Co.*, 13 O.L.R. 423, at p. 439.

MacGregor, for plaintiff. *C. A. Moss*, for defendants.

Master in Chambers.] [Feb. 4.

REX EX REL. WARNER *v.* SKELTON AND WOODS.

Municipal elections—Quo warranto—Parties—Joinder of respondents—Grounds of objection common to both—Municipal Act, 1903, *s.* 225—*Form of recognizance.*

Motion by the relator, in the nature of a quo warranto, to

void the election of the two respondents as reeve and councillor respectively of the village of Mimico.

THE MASTER:—The respondents relied on the construction of s. 225 of the Municipal Act, 1903 (9 Edw. VII. c. 19), given by Street, J., in *Reg. ex rel. Burnham* v. *Hagerman and Beamish*, 31 O.R. 636. It is there laid down that it is only where a joint offence or ground of disqualification is alleged that there can be a joinder of respondents. While holding that the respondents were both duly qualified, the learned Judge is careful to add at the close: "The motion must therefore, *upon all grounds*, be dismissed with costs."

It cannot, therefore, be said that the decision on the point in question was merely obiter. Even if it were, such a considered and definite expression of opinion could not properly be disregarded by me. To do so would be a violation of the principle laid down in *Cruso* v. *Bond*, 9 P.R. 111 (at a later stage see report in 1 O.R. 384).

It was also said that in the earlier case of *Reg. ex rel. St. Louis* v. *Reaume*, 26 O.R. 462, it had been decided that s. 225 did not bear this interpretation, and that this case was not cited in the *Burnham* case. But it is not to be supposed that this latter case was unknown to the late Mr. Justice Street, and it is clear that this decision does not conflict with his. All that was decided by the St. Louis case was that where different respondents are attacked in the same proceeding and on the same ground, the section in question does not require that the same judgment must be given as to all. There, as in all the other cases that I can recall, where there was more than one respondent, there has been one main ground of attack against all. When separate grounds have been considered, the present objection was not taken, or, if taken, was not pressed, nor was it ever necessary to decide it.

It is also to be observed that in the present case the recognizance provides only for "such costs as may be adjudged and awarded to the said defendants against the relator." This may be held to mean jointly only, and not to be enforceable in favour of one only. It follows the form given in Biggar's Municipal Manual (1900), p. 240. In some cases the recognizance is made in favour of the defendants "or any of them;" but it is not clear that there is any authority for this change.

However that may be, it seems better to follow the decision in the *Beamish* case, and leave it to the relator, if dissatisfied,

to have this point settled on appeal, so that it may be made clear what s. 225 really means.

At present, in my opinion, the motion must be confined to such grounds of objection (if any) as are common to both parties, and in which they jointly participated, assuming that this can be done. Otherwise the motion must be dismissed with costs. This would not prevent new proceedings being taken if brought within the statutory period, which has still at least a week to run.

Meek, K.C., for relator. *Godfrey*, for respondents.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] [Feb. 18.

ST. CHARLES & Co. *v.* VASSALO.

Intoxicating liquor—Sale through agent—Knowledge of intention to violate law.

Where a sale of intoxicating liquor is made by a principal through an agent to a purchaser who, to the knowledge of the agent acting in the course of his employment and within the scope of his authority, intends to dispose of the same in violation of law, the contract is void for illegality and the principal cannot recover the purchase-price.

In such a case the knowledge of the agent is attributed to the principal and it makes no difference that the principal reserves to himself a discretion as to whether he will accept the order or not. *Craigellachie* v. *Bigelow*, 37 N.S.R. 482, 37 S.C.R. 55, distinguished.

DRYSDALE, J., dissented on the ground that the agent in question only had a limited authority to solicit and transmit orders and had no authority to make sales, and his knowledge (as to which he thought the evidence insufficient) was therefore not sufficient to bind the principal.

F. McDonald, for appeal. *J. J. Ritchie*, K.C., contra.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] KELLY *v.* KELLY. [Feb. 13.

Partnership—Profits made by one partner in private speculations with partnership funds—Partnership Act, R.S.M. 1902, *c.* 129, *ss.* 22, 24, 32.

Appeal from judgment of MACDONALD, J., noted vol. 46, p. 36, allowed with costs, CAMERON, J.A., dissenting.

The defendant was the master-mind of the partnership, a firm of builders and contractors. He possessed great executive and organizing ability and contributed from time to time nearly all the capital with which in a period of 25 years large profits were made in carrying on that business. The plaintiffs were his brothers, men with little education or ability, competent only to act as foremen on the works. They always acted on the defendant's orders, and only drew money from the firm for their own use, when and as permitted by the defendant. He allowed Martin Kelly to share equally with him in the profits and Michael got one-fourth, but this was because they were his brothers, and from motives of generosity and ties of affection. There had never been any written articles of the partnership, which was one at will; but after its dissolution, the plaintiffs claimed to share in the profits made by the defendant in speculations, mostly in real estate with moneys drawn by him from the partnership funds before any ascertainment of the respective shares of the partners in, or any division of, the profits. The total amount so drawn out by the defendant was much less than he would have been entitled to had such division been made. Entries were made from time to time in the books of the firm by direction of the defendant shewing particulars of the transactions in question. The plaintiffs, though they were aware of some of the speculations, made no inquiries about them and appeared to have taken at the time no interest in them. The defendant never made the firm liable for postponed payments on his purchases, but gave his own covenants only; and, in cases where he made losses, they were never charged to the firm. Each of the plaintiffs had on several occasions, without the knowledge of the other, obtained the defendant's consent to draw out money for private speculations on his own

account. The defendant had, from the beginning, followed the practice of paying his own money into the firm so as to improve its position financially and to allow it the use of the money.

Held (CAMERON, J.A., dissenting), applying s. 22 of R.S.M. 1902, c. 129, that the course of dealing between the partners had been such that there should be inferred from it a consent of all the partners that their mutual rights and duties, as defined in sections 24 and 32 of the Act, should be varied so as to allow the defendant full liberty of action in respect of any funds which he would have been entitled to withdraw on a division of the profits, that the entries in the books had been made as they were only for convenience and not as shewing partnership transactions, and that the plaintiffs had no right to share in the profits of speculations clearly intended by the defendant as private ones of his own. *Ex parte Harris*, 2 V. & B. 210, followed. *Helmore* v. *Smith*, 35 Ch. D. 456, distinguished.

The contrary intention, which, by s. 24 of the Act, would prevent property bought with money belonging to the firm from being deemed to have been bought on account of the firm, sufficiently appeared from the evidence.

Per PERDUE, J.A.:—1. The intention to be considered in this case is that of the defendant alone, and it is not necessary to shew that it must be that of all the partners. *Ex parte Hinds*, 3 De G. & Sm. 613, followed.

2. The plaintiffs had constructive notice or means of knowledge of what the defendant was doing and their consent may be implied from that: *Ex parte Yonge*, 3 V. & B., p. 36.

Minty and *C. S. Tupper*, for plaintiffs. *O'Connor* and *Isbister*, for defendant.

Full Court.] [Feb. 13.

TORONTO GENERAL TRUSTS CORP. *v.* DUNN.

Automobile—Negligence—Liability of driver for injury to pedestrian—Burden of proof—Contributory negligence.

The administrator of the estate of Andrew McKay brought this action under the Act respecting Compensation to Families of persons killed by accident (R.S.M. 1902, c. 31), claiming damages on behalf of certain relatives of McKay who, when walking across a public street at night, was killed by being run

over by an automobile driven by the defendant, as it was alleged, negligently. The lights carried by the machine at the time, although perhaps sufficient to comply with the requirements of the Motor Vehicle Act, 7 and 8 Edw. VII. c. 34, s. 12, were not strong enough to enable the defendant to see clearly a person walking over the crossing in front, which was in a dense shade cast by overhanging trees, and the evidence did not satisfy the trial judge that the horn had been sufficiently sounded, either to comply with section 13 of the Act or as careful conduct in the circumstances required. As to the speed at which the car was going, according to the defendant's witnesses, it was at least eight or nine miles an hour.

Held, that, the burden of proof that the defendant was not guilty of negligence in the matter was thrown upon him by s. 38 of the Motor Vehicle Act and that he had not satisfied it; also that the evidence shewed negligence on his part. The fact that it was so dark at the crossing and that he went over it at such a rate of speed that his lights did not enable him to see a reasonable distance ahead, itself constituted negligence in the defendant.

The defendant urged that the deceased had been guilty of negligence in that, if he had looked to the east, he would have seen the lights on the car approaching and avoided the accident.

Held, that, the principle that persons lawfully using a highway are entitled to rely on warnings required by statute is applicable under such circumstances, and that the usual rule of ordinary care does not impose on travellers the burden of being constantly on the lookout for automobiles and they have a right to presume that those who may be lawfully using the highway with himself will exercise a proper degree of care.

Vallee v. *G.T.R. Co.*, 1 O.L.R. 224, *Pedlar* v. *C.N.R. Co.*, 18 M.R. 525, and *Hennessey* v. *Taylor*, 189 Mass. 583, A. and E. Ann. Cas. 396, followed. Verdict for plaintiff sustained.

Bergman and *Blake*, for plaintiffs. *Whitla* and *Higgins*, for defendant.

Full Court.] [Feb. 15.

VULCAN IRON WORKS CO. *v.* WINNIPEG LODGE NO. 174.

Trades unions—Strikes—Combined action—Conspiracy to injure employers—Picketting and besetting—Damages—Injunction—Principal and agent—Criminal Code, s. 523.

Appeal by plaintiffs from judgment of MATHERS, J., noted vol. 45, p. 335, dismissing the action as against two of the de-

fendant lodges, and appeal by defendants from the judgment in so far as it condemned them, both dismissed with costs.

Full Court.] [Feb. 17.

PATTERSON *v.* CENTRAL CANADA FIRE INS. CO.

Fire insurance—Gasoline "stored or kept"—Arbitration.

Appeal from the judgment of MACDONALD, J., noted vol. 46, p. 703, dismissed with costs.

KING'S BENCH.

Mathers, C.J.] [Jan. 31.

RE STURGEON.

Infant—Permission to sue by next friend in forma pauperis—Practice.

An infant cannot sue in forma pauperis by next friend, unless it is shewn that he cannot procure as next friend a person who is willing to assume responsibility for costs, and unless the proposed next friend is also a pauper. *Lindsay* v. *Tyrrel*, 24 Beav. 124, followed.

The court will not appoint the official guardian of infants to bring an action as next friend of a pauper infant without his consent to assume the ordinary responsibility attaching to that position.

Wright, for applicant.

MacDonald, J.] STIKEMAN *v.* FUMMERTON. [Feb. 13.

Landlord and tenant—Landlord's claim for rent when goods seized under execution—8 Anne c. 14, s. 1—Lease by mortgagee to mortgagor in possession as additional security not a bona fide tenancy.

Interpleader issue as to the crops grown on the lands of Stevenson the execution debtor which had been seized by the sheriff under the defendant's writ of execution. The plaintiff was a mortgagee of the land and had taken from Stevenson, the mortgagor in possession, a lease reserving a rent of two-thirds

of the crops to secure past indebtedness and a further advance, and he claimed the right, under 8 Anne c. 14, s. 1, to have the year's rent paid by the sheriff out of the crops seized.

Held, that to entitle a landlord to such right, there must be a real lease and the rent reserved must be a real bona fide rent and not an excessive one and there should be shewn an intention of the parties to create a real tenancy at a real rent and not merely, under colour and pretence of a lease, to give the mortgagee additional security, and that the verdict should be against the plaintiff on the issue in this case.

Hobbs v. *Ontario Loan and Debenture Co.*, 18 S.C.R. 483, and *Imperial Loan* v. *Clement*, 11 M.R. 428, followed.

Curran, K.C., and *Blanchard*, for plaintiff.

Henderson, K.C., and *Matheson*, for defendant.

Province of British Columbia.

COURT OF APPEAL.

Full Court.] REX *v.* BAXTER. [Jan. 24.

Post Office Act—Infringement.

The defendants contracted with an association to transmit to every voter in British Columbia a certain circular of a political nature. They made up a number of parcels for various city centres and sent them by express, consigned to the express company's agents in the respective places with instructions to mail them in the local post offices. The drop letter postal rate of one cent on each letter was affixed.

Held, setting aside the finding of the magistrate, that this procedure of reaching the addresses was an infringement of the rights of the Postmaster-General under the Post Office Act.

Langley, for Post Office Department. *Aikman*, for respondents.

Full Court.] [Feb. 22.

BRYDONE-JACK *v.* VANCOUVER PRINTING AND PUBLISHING CO.

Practice—Discovery—Company—Examination of officer—Order XXXIA.

A witness, an officer of a company, being examined under Order XXXIA may not be ordered out of the witness stand to

inform himself of the knowledge of his fellow-servants or agents touching matters in question in an action.

IRVING, J.A., dissented.

Davis, K.C., and *Pugh*, for defendants (appellants). *Woods*, for plaintiff.

Law Societies.

BELLEVILLE LAW LIBRARY.

The report of Mr. Duncan Donald, Inspector of Law Libraries for Ontario, claims that the Belleville Law Association have the best accommodation of any in the province and made some suggestions as to possible development.

Colonel Ponton, the president, reported that 135 new books were added last week, and that portraits of Judge Fraleck and Judge Deroche are to be added to those of Judge Smart, Judge Sherwood, Chief Justice Wallbridge and Mr. A. G. Northrup, now in the library.

Flotsam and Jetsam.

Municipal ownership and the way it operates in this country is beginning to afford amusement to some wags in the United States, and they treat it in their usual breezy style. According to one writer:—

"Toronto water, provided by the civic authorities, is so bad that they have to strain it through a ladder to separate it from the debris. Citizens take it out of the tap with a gimlet, and treat it with a solution of chloride of lime and sulphite of copper to remove the germs. Any germs that are too big for this treatment they take out to the back alley and kill with a club."

This puts in jocular form a probable condition of things too ghastly to contemplate with composure.

Canada Law Journal.

VOL. XLVII. TORONTO, APRIL 1. No. 7.

THE REFERENDUM.

That so democratic a measure as the proposal to decide by a popular vote great constitutional questions should be seriously considered by any British politicians is sufficiently remarkable. That it should be put forward as an essential feature in his policy by the leader of the Conservative party shews how recent agitation has affected the very foundations of the British constitution.

The reason for resorting to such means for settling great national questions is no doubt due to the change which has taken place in the High Court of Parliament wherein all such matters are of right and wont to be considered and disposed of. So long as the nation was divided into two parties only, the one naturally averse to change, and the other constantly desiring it, and the leaders of each pursuing a well-defined policy, there was no difficulty in finding out to which side the majority inclined. But when, instead of the two parties, we have three or four of such numerical strength that it is in the power of any one of the number to control the course of events, though not itself having the support of a majority of the electors, the situation becomes very different. There is in such a case no means of knowing what the opinion of the electorate really is on a question so dealt with, and the action of Parliament might be in opposition to the wishes of those whom it represents. It is to find a means of meeting this difficulty, and having also in view the possibility of government by a single chamber, or with a second chamber deprived of the power to control the action of the first, that has caused the question of the referendum to become a practical issue in Imperial politics.

The passage of what is known as the Veto Bill would reduce the functions of the second chamber to those of a merely consul-

tative character, and practically bring about government by a single legislative body upon whose action no check would exist. Such a check could be found by means of the referendum, power being given to a minority upon any great constitutional question to demand an appeal to the electors at large.

Or supposing the result of proposed constitutional changes should be the establishment of a second chamber so constituted as to have, with some exceptions such as that of financial control, equal power with the first, there would always be the danger of a deadlock between the two Houses such as now exists, and the referendum might then be made use of for the settlement of the question. It would appear then that there are three contingencies in which the referendum might usefully be resorted to as the final court of appeal in constitutional difficulties, and it will be noted that each of these has recently arisen. These are new features in the political horizon, and to meet them there is now no provision existing. How far the proposed remedy would, if adopted, be effective remains to be seen.

In considering the application of the referendum to any political question it must be remembered that the members of the Imperial Parliament are not mere delegates sent to represent the views of some particular set of people, and to carry out their behests—they represent the nation at large, they are entrusted with the interests of the whole community, and it is their duty to act according to what they believe to be right regardless of the varying shifts and changes of public opinion. They are responsible for the government of the country; and would not, therefore, the reference of any question to a popular vote relieve them of that responsibility, and throw the whole parliamentary system into confusion? Again what certainty would there be that the popular vote would really represent the sober thought of the electorate?

The same popular clamour which turns the scale at a Parliamentary election might be as easily excited in the case of a referendum, only on a much larger field, and therefore more likely to defeat the object in view. In trying to secure an ob-

ject by a departure from usual and well-recognized methods there is always the danger of finding ourselves in dangers and difficulties greater than those from which we are trying to escape, and such might be result of grafting so democratic a branch upon the old trunk of British Parliamentary Government. In Australia, and in some of the States of the American Union, the referendum has been adopted for the settlement of disputed questions, but so far the trial has given no results that would be of any value, and the conditions are in many respects different from those which we have been considering. The system has been long an essential part of the Swiss constitution, but there again the conditions are altogether different, and the procedure is so complicated that it would never suit a body of British electors, and would make the British system of Parliamentary Government impossible. We therefore look in vain for any precedent to guide us in dealing with this new and interesting proposal, so entirely foreign to our present constitutional principles and practices.

EVIDENCE OF CONVERSATION BY TELEPHONE.

Whether the evidence of a bystander is admissible as to what was said at the telephone instrument, it being proved by the person speaking that he was holding a conversation with a party to the suit, was raised for the first time, we believe, in a Canadian Court in the case of *Warren* v. *Forst*, 22 O.L.R. 441, and the case affords an illustration of how the English law is moulded to suit new conditions of life as they arise. Of course no one can suppose that the common law could have expressly provided for evidence of conversations held at telephones, because until very recent years communications by telephone were unknown. But as modern inventions develop new methods of communication, the common law has to be developed to meet the new conditions. Our courts may soon have to consider how far the old maxim cujus solum ejus est usque ad cœlum will have to be

modified in view of the modern practice of using flying machines, and the courts may have to say some day whether an aviator has any right to interfere with the free use of a man's column of air usque ad cœlum. We may, however, dismiss that inquiry for the present, as we are now more particularly concerned with that modern convenient nuisance which we call the telephone. In the case in question the defendants tendered the evidence of a witness as to what had been said by one of the defendants at a telephone instrument in a conversation which the defendant proved was held by him with one of the plaintiffs. Sutherland, J., who tried the action rejected the evidence but the Divisional Court (Boyd, C., and Latchford and Middleton, JJ.) held that it should have been received quantum valeat and granted a new trial; the Divisional Court adopting the view taken by the American Courts which have held that such evidence is admissible; e.g., *Miles* v. *Andrews* (1894), 153 Ill. 262; *McCarthy* v. *Peach* (1904), 186 Mass. 67; *Planters Cotton Oil Co.* v. *Western Union Telegraph Co.* (1906), 6 L.R.A.N.S. 1180. As the learned Chancellor points out such evidence may be intrinsically entitled to but little weight, because the witness cannot testify who was the person with whom the conversation was actually held, nor that such person, whomsoever he was, actually heard what was said.

But these considerations go, in the opinion of the Divisional Court, merely to the question of the weight to be attributed to such evidence, and not to its admissibility. But it may not be improper to remark that this decision seems somewhat to invade the hitherto accepted principles regarding the admissibility of evidence. The evidence in question is clearly admissible only on the ground of its alleged corroborative character, and is only admissible so far as it actually is corroborative. Evidence that such and such statements were made by a defendant, can only derive any right to be admitted as evidence by reason of the fact that they were made to some particular person, and it is just at this point that the evidence of a bystander at a telephone as to what is said there wholly fails. The evidence therefore may appear to

corroborate though it does not actually do so. It may be asked how corroboration of an immaterial fact can properly be said to be admissible as evidence. The mere fact that a defendant spoke certain words is itself immaterial, and the fact only becomes material by their being proved to have been spoken to a particular individual, the corroboration in the case in question is not of the material fact that they were spoken to a particular individual, but simply of the immaterial fact that they were spoken.

The evidence in question is really not properly corroborative, but is calculated to give an illusive weight to the evidence of some other person; and it seems open to question whether the ends of justice might not have been better served if the decision had been the other way, especially when the opportunity it affords for manufacturing evidence is considered.

COUNTY COURT JURISDICTION—ONTARIO.

A point of some practical importance may arise and perhaps has arisen in connection with the County Courts Act of last session. It will be noticed that s. 22 [para. (*e*) and (*f*)] of that Act (10 Edw. VII. c. 30) provides that actions for recovery of property, real or personal, are limited in County Courts to cases where the value of the property does not exceed $500; and that in the case of actions for foreclosure or sale, or for the redemption of mortgages, such actions are limited to cases where the claim does not exceed $500. The apparent difficulty lies in this, that in the case of an action for foreclosure or sale where the sum claimed does not exceed $500, the plaintiff may proceed in the County Court, but if the value of the land happens to exceed that amount, the plaintiff would be precluded from joining in his action the customary claim for an order for immediate possession as it would transgress the provision relating to actions for recovery of land. The result would be that he would have to resort to the High Court for foreclosure or sale. This would be much more expensive, and would defeat the object of the enact-

ment. A remedy might possibly be the introduction of a special provision allowing the plaintiff in a foreclosure or sale action to include a claim for possession of the mortgaged property, notwithstanding the fact that the value thereof might exceed $500. As a matter of fact it will be found that in the great majority of cases of mortgages under $500 the value of the land which forms the security very much exceeds that figure.

AERIAL NAVIGATION AND THE LAW WHICH SHOULD GOVERN IT.

The airship, or flying machine—though we get no inkling there of the pattern which the experimenters chose—if the sublime narrative in "Paradise Lost" of the conflict between the celestial hosts and the troops of the fallen angel is to be relied on, must have been of pre-creation origin. And it should be interesting to mark what the sacred poet (his mouthpiece being the Angel Raphael) who tells our first parents in the garden the story of that stupendous warfare, when speaking of the Omnipotent's forces, writes: "For high above the ground their march was, and the passive air upbore their nimble tread." Continuing, he says: "High in the air, exalted as a god, the apostate in his sun-bright chariot sat." His account depicts how the needful engines for maintaining the strife were supported in the air, while, at the same time, dexterously guided through it by those charged with their management. Neither can it be out of place, in dwelling on the grand spectacles which the mind here passes in review, to recall the extravagant fancy Milton has evoked when he ascribes to Lucifer the invention of cannon, more particularly as this grim agent of destruction by its ponderousness would notably detract from the buoyancy required in aerial navigation.

That fellow-bard, Homer, in whom likewise the inner sight was accentuated by reason of the physical sense being lost, frequently, we know, presses into service, to expedite movement by his partizan gods and goddesses at the siege of Troy, vehicles suitably adapted, more or less, for cleaving the empyrean.

Since there has been so much vying between sky-cruisers, to secure and keep the record for a sustained flight, as well as extended occupancy of the air, the writer asks pardon of his readers for suggesting that rivalry having either object in view might appropriately cease, since none may hope to equal, much less excel, the triumph won by Aladdin's Palace—the largest courser of the heavens which imagination has pictured, as the equipage of Queen Mab ("her chariot was an empty hazel nut") is the smallest—the first sailing the arch immense from China to the farthest confines of Arabia and back, in a hardly appreciable moment of time, each way.

Before passing altogether from the realm of the fabulous, and taking up the drier line of reasoning which prompted this contribution, the diverting chronicle which the famed author of Rasselas hands down to us of the implement, his character (whom he calls the "artist"), designs, constructs, and finally commits heavenward, may, the writer conceives, be, with advantage, rescued from the dull recesses in which he fears that lively romance now lies unperused.

The episode is found in the chapter entitled, "A dissertation on the art of flying." Certain of the views propounded by the sanguine contriver are well worth presenting:—

"He that can swim need not despair to fly; to swim is to fly in a grosser fluid, and to fly is to swim in a subtler. We are only to proportion our power of resistance to the different density of matter through which we are to pass. You will necessarily be upborne by the air if you can renew any impulse upon it faster than the air can recede from the pressure. The labour of rising from the ground will be great, as we see it in the heavier domestic fowls, but as we mount higher, the earth's attraction and the body's gravity will be greatly diminished, till we shall arrive at a region where the man will float in the air without any tendency to fall." He theorizes again: "I have considered the structure of all volant animals, and find the folding continuity of the bat's wings to be most easily accommodated to the human form. Upon this model I shall begin my task to-morrow."

The subsequent trial and its outcome are briefly described: "In a year the wings were finished, and on a morning appointed, the maker appeared furnished for flight on a little promontory. He waved his pinions awhile to gather air, then leaped from his stand, and in an instant dropped into the lake. His wings, which were of no use in the air, sustained him in the water, and the prince drew him to land, half dead with terror and vexation." This failure seems, if more abject, less deplorable than was that of the unthinking Icárus, who neglected to allow for the heat of the sun on his waxen appendages.

There being such constantly recurring examples to be found of craft of the nature in question, both owned and controlled by subjects of a different country from that where the misadventure happens, getting into trouble with dwellers on terra firma, that the international aspect of the matter would appear to be of first-rate importance.

While "the heavens above, the earth beneath, and the waters under the earth" have been for all time assigned to man's use, and left to his superintendency, the jus gentium so far only deals with, and operates upon, the last two spheres of movement. And where the high seas is concerned, there are, of course, long-sanctioned definite rights and privileges of sovereignty enjoyed by one nation over others, with countervailing duties and obligations imposed by edict of the international college. But recognizing the doctrine of private ownership of everything on, below and above the surface (cujus est solum, ejus est usque ad coelum et ad inferos), to what extent, if any, does it become weakened in the case of the overhead empire? A proprietor of land may, so long as it has been securely enclosed, and there has been no invitation by him to come upon the premises, bring appliances there liable to cause injury to those who negligently expose themselves to danger therefrom, without being responsible for any damage referable to contact with any such. So with the keeping of ferocious animals, if one recklessly disturb them, so attracting injury to himself. Suppose, however, the owner of some mechanical device for air-transportation, while operating

it, should pass immediately over his own property, and a collision with an emulous flyer through space occur, with ill consequences to both, or the former only, could he, in the latter event, claim redress from the other? Might not his brother-pilot be able to shew the juster title to compensation? Would the individual poised in a balloon or aeroplane over the messuage of a neighbour, be a trespasser, pure and simple, accepting the risk of being answerable in damages to any and every one whom he should harm? And would he be disentitled as well to recover from all and sundry who might do him injury? The matter of a descent by a supernal Jehu on another's land, from which damage follows, offer apparently no great difficulty. One of these was the subject, as far back as 1822, of judicial inquiry and determination in the forums of New York State—*Guille* v. *Swan*—which is reported in 10 Johns. 381. There plaintiff was awarded damages resulting from the act of a manipulator of a balloon, who, finding that his descent was going to be precarious, invited help from a crowd of people. These, rushing hurriedly to his assistance, trampled down, in their well-meant efforts, a crop of vegetables in plaintiff's garden. It may be observed, by the way, that the court lays down the proposition that ascending in a balloon is not per se unlawful.

Perhaps one's right to use the superambient air is in the nature of an incorporeal hereditament, though, on the other hand, the public may demand to exercise it as a franchise not unlike that of common warren. Is the maxim now being discussed, however, true, absolutely and unequivocally?

Lord Ellenborough appeared to think not, when, in *Pickering* v. *Rudd*, 4 Camp. 219, he controverts the proposition that a landowner would have the right exclusively to the air above his enclosure. The principal has been commented on recently by Kay, L.J., in *Lemmon* v. *Webb*, 3 Chy., who says, at page 20, "but Lord Ellenborough doubts whether the passage of a balloon over land would be a trespass; while Blackburn, J., questions the authority of that decision in *Kenyon* v. *Hart*, 6 B. & S. 249. Maude, J., intimates a like doubt in *Fay* v. *Prentice*,

1 C.B., at p. 840, where he says, "the maxim" (quoting it) "is not a presumption of law applicable in all cases, and under all circumstances; for example, it does not apply to chambers in the inns of court." Coltman, J., observes that for a cornice which overhangs another's property to constitute a trespass is opposed to the opinion of Lord Ellenborough. "Clearly it would be a trespass to sail over another man's land in a balloon at a level within the height of ordinary buildings, and it might be a nuisance to keep a balloon hovering over the land at a greater height:" Pollock on Contracts.

Were the standards fixed by international law in the provinces, which, at present, they regulate to affect, in the future, this department of activity, may we not hear of a dirigible, of foreign make and ownership, intending a flight in some alien state, being, as was the British vessel lying at its moorings in Rotterdam, regarded as part of the country where it lingered? Or, in that contingency, importing the rule that the authority of municipal courts does not embrace points in the sea, there may be a recrudescence of the problem which, in the famous *Coombes* case, a century and a half ago, taxed to the full the acumen of the whole body of justices of the King's Bench to solve, whether the killing of a man on a ship a hundred yards away, by one who fired upon him from the shore, occurred within the Admiralty, or the ordinary land, jurisdiction.

The pathway of international law, in any event, should it ever lie through such wide-ranging, unproved field—without landmarks to assist, and where anything like precise demarcation of frontiers must be impracticable—will unquestionably be a thorny one.

J. B. MACKENZIE.

HARMLESS ERROR.

Whilst a discussion of this subject is of more importance in the United States than in Canada, there are some points in the article we copy from the *Central Law Journal* which are not without interest in this country. The writer thus deals with it:—

There is no dispute in this country about the doctrine that error in a trial, which works no prejudice to one complaining thereof, cannot be invoked as a basis for re-examination of a result. In perhaps every state and federal court of this country, this doctrine, in one form or another, and with much iteration in each, has been announced. Such error comes under the maxim de mimimis non curat lex.

Possibly, also, there is little, if any, dispute concerning the standpoint from which the existence or non-existence of prejudice is to be viewed, and that standpoint is, that in a trial a party must have conceded to him the right to conduct his action or defence in whatsoever way the law allows, and any error which prevents such conduct is prejudicial, unless independently of its commission, it plainly appears that he either has no right of action or no ground of defence, as the case may be. This rebuttal of prejudice is also shewn in such decisions as declare that a judgment for defendant should not be disturbed, where plaintiff is not entitled to recover in any event, or that the decision is correct on the merits, or that a defence is generally baseless and insufficient, of which see cases passim.

The trouble arises more in the attitudes of courts when they come to consider whether error has affected, sufficiently to demand a retrial, the right of a party to conduct his action or defence, and whether it has been shewn, despite such error, that he had no substantial right of action or defence, as the case may be.

Cases in which proof shews no action or defence.—Taking the matter up in something of an inverse order, as last above stated, we will endeavour to ascertain whether the rebuttal of prejudice need go to the extent of shewing, that it ought to

appear that the trial court should have instructed for defendant as to plaintiff's action or for plaintiff as to defendant's defence, or pro tanto considering the error complained of. Refusal of a new trial, because prejudice from error is overcome, does not take into account, or at least need not take into account, any views about presumption of prejudice from error and whether the burden is on appellant to shew prejudice. It cuts from under all claim of prejudice the possibility of harm by saying there is nothing for prejudice to affect.

The cases, therefore, which hold that the losing party should not have had any contention by way of action or defence decided in his favour need not be adverted to, for, according to Alabama practice there should have been an affirmative charge in favour of the party not complaining, applying such rule to an entire action or defence as to what the error, *e.g.*, a claim of set-off, affects. And so those cases or the particular issues therein as to which a favourable verdict in favour of a complaining party would not be allowed to stand. Much authority could be cited to these propositions, but merely a few illustrative cases are referred to.

Cases in which verdict for either party would be sustained.—It may, in view of what has gone before, be said, that it is only where a losing party could claim that a verdict in his favour would stand, that any error against him in the course of a trial may be complained of at all. Not even, then, may he successfully complain, unless the error interfered with a full and fair consideration of his action or defence and that interference was not nullified or negatived in the course of the trial. It is in these cases only in which error may be properly said to be harmless or prejudicial. In all others there being nothing upon which prejudice can operate, its presence or absence is a mere figment of the mind.

Presumption of prejudice from error.—There are cases which announce as a principle of law, that error is presumed to be prejudicial to the interests of him against whom it is committed. As strong an expression of that principle as we have

seen given is by the federal Supreme Court, which said: "While an appellate court will not disturb a judgment for an immaterial error, yet it should appear beyond a doubt, that the error complained of did not and could not have prejudiced the rights of the party duly objecting." A California court has said in effect, error would not be deemed harmless unless it appears that no harm could have been or was done thereby and it does not suffice to shew that probably no harm was done.

It has also been stated, that the admission of illegal evidence requires a reversal, if it cannot be said what effect it may have had on the minds of the jury. So as to the exclusion of competent evidence there is presumption of prejudice unless it clearly appears it was not of importance to the party offering it, where the exclusion was erroneous.

On the other hand expression of the rule has been stated with much more mildness. Where the error referred to procedure, such as giving the wrong party the right to open and close, prejudice will not be presumed, but must be shewn, but as against this the Supreme Court of Missouri appears opposed, in holding that the wrongful over-ruling of a challenge for cause will be deemed prejudicial, whether or not the challenger has exhausted his challenges. And it has been said as to immaterial and irrelevant evidence, that on its face it must appear to be calculated to have an improper influence.

In regard to instructions erroneously given or refused, we find similar opposition in expression about presumption of prejudice. In Arkansas it is stated, with regard to refusing a proper requested instruction and the giving of an erroneous instruction, that prejudice is presumed. Also, the federal courts say it must be said that there is prejudicial error, though there be two theories, upon either of which the verdict could stand, if there was an erroneous instruction regarding one of them, if there was no way of telling which theory the jury adopted. The same result ensues from conflicting instructions, as it cannot be said which the jury followed. And even misleading instruction presumes prejudice, it only being necessary to see that it could, not did, mislead.

Some courts adopt a less stringent application of the rule or confine it more according to the nature of the case in which prejudice is claimed from error. Thus it has been held that where there was an "unusually fair trial" free from passion or prejudice and substantial justice appears to have been done, the errors must be very grave and material for the findings to be set aside. In Wisconsin it was held that improper evidence should not cause reversal, unless it clearly appears that but for its admission the finding would have been different.

Error harmless pro tanto and prejudicial specially.—The particular evil in American administration of law, generally speaking, is that, while our facilities in the way of presenting, verbatim et literatim, a complete record of a trial in a court appealed from, yet errors wherein they are certainly harmless are taken to be generally prejudicial and overturning everything that has been done in the trial court. This is exemplified in ruling generally that a new trial should be awarded where there is error and injury—thus not confining the injury to its scope. Thus take the case where the cross-examination of a particular witness is denied or unduly restricted. This case argues on broad lines about the right to free and full cross-examination, which being denied is presumed to work injury, and though in the case the cross-examination may have been concerning that which went to the root of the whole case, a wide statement of this kind is misleading in tendency. In a Nebraska case the evidence held incompetent and prejudicial related merely to the question of damages and yet the case was remanded generally for a new trial. In a Missouri case we find the scope of the prejudice caused by certain incompetent evidence stated, *i.e.*, its effect on the amount of recovery, and yet the cause was reversed and remanded for a new trial generally.

But it is unnecessary to go into extensive citation of cases on this question, for every case, in which a reversal and remand is directed, unless a plaintiff will consent to an affirmance with a reduction of damages, goes upon this theory. In North Carolina, we find the partial new trial theory the rule, and occasionally resorted to in other states.

What is meant by prejudice is presumed and the converse.—Prejudice must be shewn.—There is nothing more firmly seated, than that a juror is not allowed to impeach his own verdict. Affidavits may be submitted for the purpose of bringing to the attention of the court matters of which it would otherwise have no knowledge and from which inference of prejudice may be drawn. These are that a juror was disqualified propter affectum; or that he had expressed an opinion; or that some irregularity had occurred in the impanelling, or custody of or consideration by the jury. But what took place in facie curiae or constituted a part of the record is not to be thus shewn. But all of these things are to be judged of as to their tendency and not as any trior of the facts may say what was their effect.

Therefore, it may be thought that there is really no presumption one way or the other. The great majority of American courts say, if an error might or could have worked material harm, it should cause reversal. If it is clear that it did not, it is harmless. And these conclusions are to be drawn from a reading—a scrutiny—of the record. And so with these merely viewing prejudice more leniently.

It may be true, that here is a wide open door and that no very definite prediction may always be indulged as to the outcome of a case, when reversal is claimed and resisted for error alleged to be prejudicial. The way in which a case has been tried may eliminate the error. As for example, where there is a trial on the merits under a plea of general issue, and a general judgment for defendant on that plea, that demurrers to special pleas were erroneously overruled will be deemed harmless. If the final result arising out of special findings of fact may shew that the tendency of prejudice in a particular direction is negatived, it will not be considered.

The growth of decisions on the line of harmless and prejudicial error.—The absolute fullness of records, their complete reproduction in appellate tribunals as to everything except visual observation of witnesses and the hearing of their voices places appellate tribunals in a vastly different situation now from where

they were fifty years ago. A transcript of the evidence is greatly different than depending on the "notes" of the trial judge, or a narrative statement of what was testified to, however diligently it was attempted to keep track of everything that was said and done. The minutiae now produced in a record enable opinions to quote the very words of witnesses, when the older cases had to content themselves with the substance of what they were understood to say. If one, however, will indulge himself with a fairly critical glance at "harmless error" in the Century Digest covering more than a hundred years of American decision in comparison with what he will find on the same subject in the Decennial Edition of the American Digest, he will discover that the ten year grist of cases on this line exceeds all that has gone before. In passing, we might also say, that, in general bulk, the number of cases under the title, "Appeal and Error" for the ten years falls little below that of the entire period of hundred years that went before.

If our legislation has produced this wonderful accumulation it is sadly at fault. If our facilities in the production of perfect records have done so, it would seem that we might have been better off without them.

These perfect records seem especially to have put judicial investigation on the line of search for error and to have coined phrases which are like stereotypes in decision. "We find no reversible error and the case is affirmed;" "the verdict is for the right party;" "the case was fairly tried and the verdict is supported by the evidence," all these and others seem to invite other litigants to try their fortunes before appellate tribunals should ill luck attend them in lower courts, for they are impression, and not principle, decisions.

And yet as often as these courts seem averse to allow conclusiveness to rest where the least error occurs, still in almost the same breath, with dogmatic positiveness, they will say, where there was no error in a trial that a recovery is too large. In other words they are ready to state the precise effect of competent evidence, but refuse to declare the precise influence of that which is incompetent.

Possibly they are right under the latter position, because of the constitutional jealousy in respect to jury trials, but why this jealousy should not operate as forcefully in behalf of a respondent in an appeal as an appellant is something of a refinement my mind has not been able fully to grasp. But even, if there be substantial basis for the distinction, I would still be at a loss to understand why, if the jury's judgment is only at fault as to damages, it should be nullified in its entirety, and what would seem like a vested right accruing to plaintiff practically confiscated for no fault of himself or his attorney.

The reach of statutes in decreasing remands for error.—I have just suggested that constitutional jealousy in regard to the inviolability of jury trial governs American courts in their consideration of the question whether error is harmless or prejudicial. This is the theory, but I do not believe it can be claimed, that the history of any appellate court in this country shews entire consistency in its application. But there is another principle quite universally recognized even in jurisdictions where there is constitutional guarantee of jury trial—and this means a fair jury trial. This principle is that only in such cases from the decision of which a constitution specifically provides for an appeal is an appeal other than of statutory creation. This implies, as has often been held, that the statute may impose whatsoever conditions to its taking a legislature sees fit to impose.

Therefore, it seems to me that the statute may authorize an appellate court to adjudicate as against appellant as fully as the nisi prius court could, but it cannot impair an iota, in jury trial cases, the rights of appellee except for prejudicial error. But prejudicial error may be severely limited in his favour.

Let me illustrate by the bill proposed by the American Bar Association to Congress: "To regulate the judicial procedure of the courts of the United States." It proposes to eliminate from consideration in an appellate court all error except that which "has resulted in a miscarriage of justice." I do not much relish the quoted language, but take it to intend to say, that but

for the error a verdict might or even probably would have been for the other party, yet it should stand in an appellate court, if there is evidence to support it. If it does not mean this, it advances little from where we now stand. It is, however, a miscarriage of justice, in one sense, to turn a finding from what it would have been but for error, whether there is support for the other event or not or even if the latter should happen to be the correct event.

Nevertheless the legislature has the right to say this much, because it is no more than saying to an appellant that he has had his day in court and it is a matter of grace to hear him further.

Instead of such a provision, I would say that the proposed bill should provide, that on an appeal the respondent's right to a jury trial on questions of fact should never be impaired without his consent, and, if error which militated against appellant's right to a fair jury trial is found in the record, the court should nevertheless not remand without respondent being first allowed to demand that the appellate court render the verdict it thinks the jury should have rendered.

To make a provision of this kind operative in every case, it should be made obligatory on appellant to furnish a record as complete as in the court below or the judgment should be affirmed, unless respondent stipulates that what is before the court is sufficient for a disposition of the case.

In addition to this, remands could be lessened by requiring appellate courts to disregard as prejudicial all merely technical error and all errors in procedure, which do not palpably interfere with the function of the jury in its consideration of facts. In other words, to the principle that there is presumption of prejudice from error, I would add that it extends only to that which could or might be an invasion of the province of the jury in its findings of fact. As to other error, every presumption should be the other way.

I can conceive that respondents in whose favour there was error below might sometimes prefer remands to having the appellate tribunal decide a cause, but if they do, at least, neither

party could complain, for this is what the appellant asks for and what his adversary grants. Nevertheless, the speculative feature in appeals would be largely eliminated, for if an appellant has really no meritorious action or defence he will believe respondent will in the Court of Appeal terminate the litigation, possibly with larger judgment in his favour than that appealed from, in the meantime securing its payment. I think the particularly desirable thing about appellate courts is to have them end, instead of prolong, litigation.

N. C. COLLIER.

St. Louis, Mo.

A HUMAN DOCUMENT.—It will be remembered that H. Rider Haggard in one of his stories, has the will of a shipwrecked man of wealth tattooed upon the shoulders of a companion, and represents the unique testament as having been admitted to probate in the chancery court in England. This flight of the imagination has since been justified by the action of a miser, named Monecke, who died in Mexico. His relations were unwilling that his body should be buried, as he had tattooed his will over his chest with some red pigment, instead of using pen and ink. The court directed that this remarkable " human document " should be transcribed and the copy duly attested in the presence of witnesses. This was done, and the court gave effect to its provisions.—*Exch.*

A GENEROUS TESTATOR.—Lord Pembroke gave "nothing to Lord Say, which legacy I gave him, because I know he will bestow it on the poor;" and then, after giving other equally peculiar legacies, he finished with, "Item, I give up the ghost."—*Exch.*

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

POWER OF APPOINTMENT—GENERAL POWER—EXERCISE OF POWER BY WILL — APPOINTMENT OF EXECUTORS AND BEQUEST OF PECUNIARY LEGACIES—ESTATE OF TESTATRIX INSUFFICIENT TO PAY DEBTS AND LEGACIES—WILLS ACT, 1837 (1 VICT. c. 26), s. 27)—(10 EDW. VII. c. 57, s. 30 (O.)).

In re Seabrook Gray v. *Baddeley* (1911) 1 Ch. 151. In this case a testatrix having a general power of appointment made a will containing no residuary bequest of personal estate, whereby she made certain specific devises of her real estate and directed the remainder of her lands should be sold and the proceeds divided between her nephews who were to pay to each of the testatrix's three nieces £500; she made certain specific bequests and appointed executors. Her estate proved insufficient to pay her debts and legacies, and the question was whether the will amounted under the Wills Act, 1837, s. 27 (10 Edw. VII. c. 557, s. 30, Ont.) to an execution of the power, and, if so, to what extent. Warrington, J., held that the will operated as an execution of the power, by virtue of the Wills Act to the extent that might be necessary in conjunction with the testatrix's own property to pay the debts and legacies of the deceased testatrix.

RECEIVER — PARTNERSHIP ACTION — CONSENT ORDER APPOINTING RECEIVER AND MANAGER—PAYMENTS BY RECEIVER—INSUFFICIENCY OF ASSETS — INDEMNITY OF RECEIVER — LIABILITY OF LITIGANTS PERSONALLY TO INDEMNIFY RECEIVER.

Boehm v. *Goodall* (1911) 1 Ch. 155. This was an action to wind up a partnership, and by consent of parties a receiver and manager of the partnership estate had been appointed. The receiver had paid out moneys in carrying on the business of the partnership as a going concern which the assets of the concern were now insufficient to pay: and the receiver applied to the Court to compel the partners to indemnify him in respect of the balance due, but Warrington, J., refused the application, holding that the receiver was an officer of the court and could only look to the assets for his indemnity and the fact that he had been appointed by consent, did not put him in any better position: see, however, *Matthews* v. *Ruggles-Brise*, infra.

COMPANY — MEMORANDUM OF ASSOCIATION — ASSENT OF PREFERENCE SHAREHOLDERS TO NEW ISSUE OF PREFERENCE SHARES— PREFERENCE SHARES ALL HELD BY ONE PERSON—"MEETING."

In *East* v. *Bennett* (1911) 1 Ch. 163, the validity of an issue of preference shares by a limited company was in question. By its memorandum of association the capital was divided into preference and ordinary shares, and the company was empowered to increase its capital, but it was provided that no new shares should be issued so as to rank equally with, or in priority to, the preference shares, unless such issue was sanctioned by resolution of the holders of preference shares present at a separate meeting specially summoned for the purpose. The articles contained a similar provision. Shortly after its incorporation a special resolution was passed authorizing an increase of capital. At that time one Bennett who was the holder of all of the original preference shares presided at the meeting and assented to the issue of new preference shares, and his assent was duly recorded in the minute book, and in pursuance of the resolution new preference shares were issued. Warrington, J., held that there was nothing in the constitution of the company to prevent all the preference shares being held by one person and that the word meeting was not to be construed strictly but must be held to apply to the case of a single shareholder, and in the circumstances he was of the opinion that there had been a sufficient compliance with the memorandum and articles and that the new issue of preference shares was valid.

TENANT FOR LIFE AND REMAINDERMAN—SETTLED MORTGAGES — ARREARS OF INTEREST—RENTS AND PROFITS—APPLICATION OF RENTS AND PROFITS—APPORTIONMENT OF RENTS AS BETWEEN CAPITAL AND INCOME.

In re Coaks, Coaks v. *Bayley* (1911) 1 Ch. 171. This was a contest between a tenant for life and a remainderman as to the apportionment of the rents and profits of mortgaged property the subject of a settlement by will. Prior to his death the testator had entered into receipt of the rents and profits of the mortgaged property and the trustees of his will continued in such receipt. The securities being deficient the question arose as between the tenant for life and the remainderman as to the proper apportionment of the rents. Warrington, J., determined that the trustees must apply each instalment of rent received since the testator's death from each mortgaged property, in satisfaction of

arrears of interest which, at the testator's death, were due in respect of the mortgage, and then distribute the balance as income up to, but not exceeding, the interest accrued since the testator's death on the mortgage, and any excess was to be treated as capital.

FIDUCIARY RELATION — GIFT — NATURAL AFFECTION — DUAL RELATION EXISTING BETWEEN DONOR AND DONEE—INDEPENDENT ADVICE.

In re Coomber, Coomber v. *Coomber* (1911) 1 Ch. 174. This was a family quarrel in which the validity of a gift from a mother to her son was impeached. Under the father's will all his property devolved on the mother, part of it being a long lease of a tavern. A son Harry had assisted his father in carrying on the business of the tavern and after his death he continued to do so for his mother. In September, 1905, she executed an assignment of the lease to him for his own use and the next day the license was transferred to him. No consideration was expressed in the deed, but Harry agreed to let his mother have £3 per week out of the business, and this sum was regularly paid to her in addition to the £3 per week derived from other property during her life. The judge who tried the action also found as a fact that the mother made the assignment in the belief that she was thereby carrying out her deceased husband's intention. The assignment was prepared by a solicitor who had acted for the mother in the affairs of her deceased husband's estate. He saw her alone and explained the transaction and she understood what she was doing. She died in July, 1906. One of the other children brought the action claiming a declaration that Harry was a trustee of the property so assigned to him. Neville, J., held that the gift being made by the mother to her son who, while carrying on the business as her agent, was in a fiduciary relationship to her, the burden of proof was on him to rebut the presumption that the gift was induced by that relation, and he thought he had failed to discharge that burden by shewing that his mother was independently advised; but he thought he had done so by shewing that the gift was not due to any relationship which the carrying on of the business as her agent had established but that it was wholly independent thereof and induced by natural affection and because she believed she was thereby effectuating her late husband's wishes. The action was therefore dismissed.

CONFLICT OF LAWS—MORTMAIN—TESTATOR DOMICILED IN ENGLAND —BEQUEST OF FREEHOLD MORTGAGES IN ONTARIO FOR CHARITY —COLONIAL LAW—9 GEO. II. C. 36.

In re Hoyles Row v. *Jagg* (1911) 1 Ch. 179. This was an appeal from the decision of Eady, J. (1910) 2 Ch. 333, (noted ante vol. 46, p. 657). It may be remembered that the case turns on the validity of a bequest by a domiciled Englishman of freehold mortgages of land in Ontario for a charity. Eady, J., held the bequest void, as being a gift of impure personalty and therefore within the Statute of Mortmain 9 Geo. II. c. 36, which at the time the will took effect was in force in Ontario, the gift, as he held, being governed by the law of the situs of the land. This decision the Court of Appeal (Cozens-Hardy, M.R., Moulton, and Farwell, L.JJ.) have affirmed, Moulton, L.J., dubitante. Farwell, L.J., thought that it was immaterial whether English or Ontario law applied, because at the time the will took effect the law was identical in both countries; but for the purposes of international law he was clearly of the opinion that mortgages of land, notwithstanding they are regarded as personal estate, do nevertheless come under the category of immovables.

TRUSTEE—INDEMNITY—CHANGE OF CESTUI QUE TRUST—NOVATION.

Matthews v. *Ruggles-Brise* (1911) 1 Ch. 194. In this action a trustee claimed to be indemnified by his cestui que trust in the following circumstances. In 1879 two partners of a firm took an onerous lease as trustees for the benefit of the partnership. In 1886 the partnership transferred all its assets to a limited company, and the company agreed to indemnify the firm against its liabilities; whereby the company became entitled to the benefit of the lease. One of the trustees died in 1886; and in 1887 the surviving trustee assigned the lease to the company taking a covenant of indemnity from the company. In 1881 the surviving trustee died, and in 1909 his personal representatives were sued on the covenants in the lease and were compelled to pay £5,874 for rent and breach of covenants in the lease and a proportionate part of this sum they claimed now to recover from the original partners. It was contended that the trustees by accepting the company in lieu of the firm as their cestui que trust had discharged the firm and that by their assignment of the lease to the company without taking anything but a covenant of indemnity they had parted with the trust property and the right to indemnity thereout, and had thereby discharged the partners.

Eady, J., however, held that the transfer of the lease to the company was part of the arrangement made by the firm with the company and that nothing which had been done had had the effect of releasing the original partners from their liability to indemnify their trustees against loss.

LANDLORD AND TENANT—LIGHT—QUIET ENJOYMENT—DEROGATION FROM GRANT—INTERFERENCE WITH PRIVACY OF TENANT.

Browne v. *Flower* (1911) 1 Chy. 219. This was an action by a tenant of a flat to restrain an alleged interference with the plaintiff's enjoyment of the demised premises. The facts were that the plaintiff and the defendant Lightbody were each tenants of flats in the same building, Mrs. Lightbody's flat was above that of the plaintiff, and she was under covenant to her landlord not to do anything on the demised premises which would be a nuisance to the tenants of the adjoining or neighbouring premises. Mrs. Lightbody falsely stating that the plaintiff had no objection, applied to the defendant Fowler for a mortgage of the premises and obtained from her leave to erect a stairway on the outside of the building from the ground to her premises, as a means of access thereto. This stairway when erected passed in front of two bedroom windows of the plaintiff's' premises; so that persons using the stairway could see into these rooms. This the plaintiff claimed was an invasion of her rights of privacy and quiet enjoyment, and she claimed a mandatory injunction for the removal of the stairway, or damages. Parker, J., who tried the action, held that what had been done by Mrs. Lightbody was not done on the premises demised to her and therefore was not a breach of her covenant, and neither did it amount to a breach of the covenant by the lessor for quiet enjoyment by the plaintiff of her premises. He therefore dismissed the action but as Mrs. Lightbody had obtained the leave to erect the staircase through a misrepresentation, he refused to give her her costs as against the plaintiff.

SALE OF GOODS—CONTRACT NOT TO BE PERFORMED WITHIN A YEAR—WRITING SIGNED BY PARTY TO BE CHARGED—STATUTE OF FRAUDS (29 CAR. II. 3. 3) S. 4—(R.S.O. c. 338, SS. 5, 12).

In *Prested Miners Co.* v. *Gardner* (1911) 1 K.B. 425 the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) have affirmed the decision of Walton, J., (1910) 2 K.B. 776 noted ante p. 18, to the effect that a contract for the sale of goods which is not to be performed within a year must be in writing and signed by the party to be charged.

INSURANCE—THEFT—EXCEPTION OF THEFT BY MEMBER OF INSURED'S STAFF—PRINCIPAL—ACCESSORY BEFORE THE FACT.

Saqui v. *Stearns* (1911) 1 K.B. 426 was an action on a policy of insurance against loss by theft. The policy contained an exception of theft committed by any member of the insured's business staff. The loss in question was occasioned by the porter of the insured acting in collusion with a member of a gang of thieves, he having admitted the leader into the premises and the theft having been committed in the porter's absence. Walton, J., who tried the action held that this was within the exception because the porter was as an accessory guilty of the theft, but the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) though agreeing in the result, held that the porter was not merely an accessory but a principal. The action, therefore, failed.

COMPANY—ACTION TO RESCIND CONTRACT TO TAKE SHARES—FORFEITURE OF SHARES PENDENTE LITE FOR NON-PAYMENT OF CALLS—INJUNCTION.

Jones v. *Pacaya Rubber Co.* (1911) 1 K.B. 455 was an action to rescind a contract for shares in the defendant company. Pending the action the defendants gave notice of their intention to forfeit the shares for non-payment of calls. The plaintiff then applied for an injunction to restrain the defendants from forfeiting the shares during the pendency of the suit. Lush, J., refused the application, but the Court of Appeal (Buckley and Kennedy, L.JJ.) granted the injunction on the terms of the unpaid calls being paid into Court to abide the result of the action. As Buckley, L.J., points out if the plaintiff should succeed in the action he would be entitled to an order for repayment of what he had paid on the shares which it is true he would have to return, but on which he would have a lien for the amount which he had paid, and it was, therefore, essential to him that the shares should remain in existence until the termination of the litigation.

PRINCIPAL AND AGENT—LIABILITY OF UNDISCLOSED PRINCIPAL—MANAGER OF HOTEL—LICENSE IN NAME OF MANAGER—UNAUTHORIZED PURCHASE BY MANAGER.

In *Kinahan* v. *Parry* (1911) 1 K.B. 459 the Court of Appeal (Williams, Buckley, and Kennedy, L.JJ.) have reversed the decision of the Divisional Court (1910) 2 K.B. 389 (noted ante, vol. 46, p. 615) not on the law, but on the facts. The question was

whether the defendants, the owners of a hotel, were liable for goods sold by the plaintiffs to the manager of the hotel in whose name the license stood, the manager having no authority from the defendants to buy from the plaintiffs. The case went off in the court below on the ground that the manager was in fact the agent of the defendants, who were liable as undisclosed principals; whereas the Court of Appeal find there was no evidence of that being the case.

MASTER AND SERVANT—LIABILITY OF SERVANTS INTER SE—COMMON EMPLOYMENT.

Lees v. *Dunkerley* (1911) A.C. 5. In this case an attempt was made to extend the defence of common employment to actions between fellow-servants. The appellants were employed by the respondents to superintend dangerous machinery in their factory. Through the negligence of the appellants in starting the machinery and their breach of the regulations made under the Factory Act, a boy in the respondents' employ was injured to whom the respondents had made compensation under the Workmen's Compensation Act, 1906. The Act provides expressly that the injured person may take proceedings against any person legally liable in damages as well as against the employer and that on the employer making compensation he shall be entitled to be indemnified by the person so liable in damages. The respondents had brought this action against the appellants and had recovered judgment. The appellants contended that common employment would be a defence to an action by the injured lad against them, and therefore they were not legally liable in damages. The House of Lords (Lord Loreburn, L.C., and Lord Halsbury, Atkinson and Shaw) without calling on counsel for the respondents, dismissed the appeal, the only authority for the appellant's contention being an obiter dictum supposed to have been uttered by Pollock, C.B., from which their Lordships dissented, "if he ever expressed that opinion." As Lord Loreburn points out, if common employment was a defence to an action between fellow workmen for negligence that would be tantamount to saying that every workman had a free hand to neglect his duty towards his fellow-workmen.

NEGLIGENCE—SAVAGE ANIMAL—LIABILITY OF OWNER.

In *Lowery* v. *Walker* (1911) A.C. 10 the House of Lords (Lord Loreburn, L.C., and Lords Halsbury, Atkinson and Shaw)

have unanimously reversed the decision of the Court of Appeal (1910) 1 K.B. 173, and Divisional Court (1909) 2 K.B. 433 (noted ante, vol. 45, p. 465, and vol. 46, p. 171). It may be remembered that the Court of Appeal held that a person having a savage horse in his field through which people were accustomed to pass without permission, was not liable for injury done by the horse to a trespasser. Their Lordships came to the conclusion that the plaintiff had passed through the field, not of right, but as one of the public who habitually used the field, and that the defendant knowing of such user did not prevent it; and that in such circumstances he was guilty of a wrongful act in keeping a savage horse in a field so used to his knowledge, without giving any warning to the plaintiff or the public of the dangerous character of the animal. The original judgment of the County Court judge was therefore restored. We notice the appeal was in formâ pauperis.

ADMIRALTY—COLLISION—BOTH SHIPS TO BLAME—LIMITATION OF LIABILITY—ADMIRALTY RULE AS TO DAMAGES.

Owners of Cargo of SS. Tongariro v. *Owners of SS. Drumlanrig* (1911) A.C. 16. This is an appeal from the judgment of the Admiralty Court in *The Drumlanrig* (1910) P. 249 (noted ante, vol. 46, p. 654). The action was by cargo owners of one ship against the owners of another ship with which it had been in collision, both vessels being to blame; and the court decided that the admiralty rule as to damages applied and that the plaintiffs could only recover against the defendant shipowners one-half the damage sustained. This decision the House of Lords (Lord Loreburn, L.C., and Lords Halsbury, Atkinson and Shaw) have now affirmed. It may be noted that Lord Loreburn refers to the doctrine of *Thoroughgood* v. *Bryan*, 8 C.B. 115, as laying down "a supposed rule" of the common law for which there was nothing to say either in principle or good sense, and that it was exploded by the House in *The Berrina*, 13 App. Cas. 1.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Full Court.] REX *v.* LUTTRELL. [Feb. 14.

Criminal law—Betting—Selling newspapers containing racing information — Conviction —Evidence—Stated case—Police magistrate—Pro forma finding.

Case stated by a police magistrate. The defendant was convicted on Nov. 4, 1910, for selling newspapers containing information that could be made use of by book-makers and others in making bets at the races held in Toronto. The conviction was under s. 235 (*f*) of the Criminal Code, as amended by 9 & 10 Edw. VII. c. 10, s. 3. The question stated was, whether the sale of papers containing records of the races two days after they were run, was with the intent to assist in betting, and whether the onus was on the Crown to prove that intent.

MEREDITH, J.A.:—The learned police magistrate seems to have been under a misapprehension of the nature of the offence with which the accused was intended to be charged: Criminal Code, s. 235 (*f*), as enacted by 9 & 10 Edw. VII. c. 10, s. 3. His statement is, that the charge against the accused was that of "having sold newspapers containing information that could be made use of by book-makers and others in making bets:" but there is, obviously, no criminal offence comprised in the statement; it would be extraordinary if there were. Under the Act, the offence, as applicable to such a case as this, is, selling "information intended to assist in, or intended for use in connection with, book-making," etc.

There was no evidence of any such intention on the part of the accused, in selling the papers in question; he was merely a newsboy, selling the newspapers in question, among many others, at a "news-stand." The purchaser had no intention of using them in any such manner, but bought solely for the purpose of laying an information against the boy. There was no evidence of any such intention, on the part of the printer or publisher of

any of the papers. All that was contained in the papers was news such as is commonly published in all newspapers; matters of public interest. Even the betting upon the races was not mentioned. To say that because, in some indirect way, some use might be made, or attempted to be made, of the news, for the purpose of betting, it ought to be found that that was the purpose of the publication or sale, is obviously absurd. If all things out of which evil can be evolved were prohibited, there would be little left; education would be prohibited, because it might be made use of for an evil purpose.

The gist of the offence is the intention; and the intention "to assist" or "for use" must be that of the accused; if the printer or publisher had such an intention, he is not absolved because the boy who sold had not; or is the seller absolved by the publisher's innocence, if he himself has the criminal intention in selling; each is answerable for his own sin of intention only.

If the detective had asked the boy for papers to assist him, or for use, in book-making or betting, etc., and the boy had then sold the papers, a case would have been made; but, as the case now stands, the boy may have been absolutely innocent of an offending; and there is no reasonable evidence that he was not.

When the evidence is quite as consistent with innocence as with guilt, there can be no proper conviction.

There was no reasonable evidence of the criminal intention, which the enactment is aimed against, in either publisher or seller; the conviction was wrong; the accused should be discharged.

In another respect the learned police magistrate erred; it is not within his power to make a pro forma finding, with a view to stating a case; he must perform his duty, just as a jury must, by a real finding upon all question necessary for the proper determination of the case.

T. C. Robinette, K.C., for defendant. *J. R. Cartwright*, K.C., and *E. Bayly*, K.C., for the Crown.

RE BREAD SALES ACT. [Feb. 14.

Weights and measures—Bread Sales Act, 1910—*Sale of "small-bread"—Case stated by Lieutenant-Governor in Council—Constitutional Questions Act*, 1909.

Under s. 2 of the Constitutional Questions Act, 9 Edw. VII. c. 52, the Lieutenant-Governor in council referred to the Court

of Appeal for hearing and consideration the following question: "Under sub-s. 2 of s. 3 of the Bread Sales Act, 10 Edw. VII. c. 95, is 'small-bread' required to be sold in separate loaves, or can a number of loaves of small bread, so called, be joined together and so without being detached by the vendor, when the same exceeds in the aggregate twelve ounces in weight."

Section 3.—(1) Except as provided in sub-section 2, no person shall make bread for sale or sell or offer for sale bread except in loaves weighing twenty-four ounces or forty-eight ounces avoirdupois.

(2) Small-bread may be made for sale, offered for sale and sold in any weight not exceeding twelve ounces avoirdupois.

Moss, C.J.O.:—The right under the statute to refer the matter is scarcely open to question; but the expediency and utility of submitting questions of the nature of the present one has been strongly questioned by eminent judges in this country and in England.

For the purpose of illustration, it is sufficient to quote the observations of Osler, J.A., in *In re Ontario Medical Act*, 13 O.L.R. at p. 502: "The difficulty in the way of answering satisfactorily questions submitted under the Act for 'expediting the decision of constitutional and other provincial questions' has frequently been commented on by the courts which have been invited—or ordered—to solve them. Generally, they are abstract questions, the answers to which must almost necessarily be of an academic or advisory character, and practically not binding upon the court in a real litigation. I may refer to what I have said on this subject in *Re Lord's Day Act of Ontario*, 1 O.W.R. 312, and other like cases, and to the observations of Lord Halsbury in delivering the opinion of the Judicial Committee in the same case, [1903] A.C. 524, and to the certificate of the judges respecting a court-martial (1760), 2 Eden 371 (Appx.)."

It seems almost unnecessary to repeat what has been said by others, that the answer to the question determines nothing, and binds no one, not even ourselves.

As I read the question, an answer is only called for as to the effect of the legislation with regard to the sale of small-bread, and not at all as to the manner of baking, and, so understanding it, I answer that, as I read the enactment, where a number of loaves of small-bread, so called, joined together, exceed in the aggregate twelve ounces in weight, they are not to be so sold.

GARROW, J.A.:— . . . In my opinion, the plain meaning of sub-s. 2, properly considered in its relation to sub-s. 1, is that no small-bread, if made into loaves and so sold or offered for sale, no matter how much less the individual or detachable portions may weigh, shall exceed in weight twelve ounces. And the palpable object is to keep the loaf of small-bread so small that no purchaser need be deceived by having it put off on him for a full loaf of twenty-four or forty-eight ounces. . . .

MACLAREN, J.A.:— . . .I am of the opinion that sub-s. 2 of s. 3 . . . only permits the sale of "small-bread," so-called, when the loaf does not, or the loaves thereof joined together do not, in the aggregate, exceed twelve ounces in weight.

MEREDITH, J.A.:— . . . The question is one of fact: if there are really different rolls or loaves, or "small-bread"—an undefined expression—they are none the less rolls, loaves, or "small-bread" because they have run together in the baking. or are attached in the way loaves commonly have been ever since loaves were made, without any one dreaming that they were anything but several loaves, there is no infringement of the provisions of the enactment; but, if in truth and in fact, they are not so attached, but the bread is all in one piece, and it is not of one of the specified weights, there is such an infringement: and is none the less so for any colourable marks or other pretences of actual division, and whether so sold or offered for sale or even if so made for sale without any offering for sale or sale.

I desire to add an expression of my entire concurrence with Judge Morson in the views of the subject which he expressed in the case, under the Act, recently decided by him—*Rex* v. *Nasmith Co. Limited,* ante 116—views which I cannot help thinking, and saying, ought to commend themselves to all reasonable men, from whom only, and not from those too much possessed by the subject, legislation should emanate.

MAGEE, J.A.:— . . . "Small-bread" is not required to be sold in separate loaves when, if joined together, the aggregate weight does not exceed twelve ounces, and a number of loaves of "small-bread" may be joined together and so sold without being detached, where the same do not exceed in the aggregate twelve ounces in weight; but not if they do exceed in the aggregate that weight.

Cartwright, K.C., and *Nickle,* K.C., for the Attorney-General.
DuVernet, K.C., and *Judd,* K.C., for the Bakers' Association.

HIGH COURT OF JUSTICE.

Clute, J.] KING *v.* BIRMEN. [Feb. 23.

Nullity of marriage—Insanity—Jurisdiction of High Court to declare marriage void.

Action for a declaration that marriage of the plaintiff with the defendant was null and void ab initio.

Held, that the High Court has no jurisdiction to declare a marriage void ab initio, upon the ground that one of the parties was of unsound mind, and therefore incapable of entering into the contract of marriage. The case does not come within the provision of the Judicial Act, R.S.O. 1897, c. 51, ss. 25 to 41, which should define the jurisdiction of the court.

W. H. Price, for plaintiff. Defendant not represented.

Boyd, C., Riddell and Middleton, JJ.] [Feb. 21.

MURRAY *v.* MCKENZIE.

Infant—Gift of chattels—Repudiation after majority—Action for return—Delay—Change of position by donee.

Appeal by the plaintiff from the judgment of Mr. Justice SUTHERLAND, dismissing the action, which was for an account, and the return of certain jewellery given by the plaintiff, while an infant, to the defendant, who was his adopted mother's executrix.

BOYD, C.:—Authorities are scanty on the subject of gifts made by infants. An infant is, by our law and the English, incapable of making a valid will, for very obvious reasons; yet the modern view as to donations of chattels is that the gift of an infant is not void but voidable. See *Taylor* v. *Johnston,* 19 Ch. D. 603.

No doubt, the gift may be ratified after majority is attained by the infant, and this does not call for any positive act; length of time may be sufficient; or it may be otherwise made to appear that there was a fixed, deliberate and unbiassed determination that the transaction should not be impeached. See *Mitchell* v. *Hornfray,* 7 Q.B.D. 592. On the other hand, when the infant has derived no benefit from what has been done, and the position of the donee has not been affected by delay, the donor, come of age, may repudiate after a very considerable

time: Encyc. of the Laws of England, 2nd ed., p. 162; and an example is given in the text of a lapse of 37 years in *In re Jones*, [1893] 2 Ch. 461.

Bradford, K.C., for plaintiff. *W. R. Smyth*, K.C., for defendant.

COUNTY COURT—COUNTY OF WELLINGTON.

Jamieson, J.] SPOTTON *v.* GILLARD. [Jan. 3.

Chattel Mortgage Act—Insolvency of mortgagor—Implied knowledge of insolvency by mortgagee—Intent to give unjust preference.

D., a retail grocer in the town of Harriston being indebted to the defendants, a wholesale firm in Hamilton, in the sum of $448, finding that he could not successfully carry on his business without more capital, wrote the defendants on June 21st, 1910, advising them of this fact and stating that he had decided to sell out, and asking them to assist him in making a sale. Subsequently, and prior to July 20th, 1910, D. returned to the defendants six unpaid drafts. The senior partner of the defendants on looking over his books noticed the return of these drafts and immediately sent P., his solicitor, to Harriston to obtain payment of the account, or security. P., on July 20th, obtained from D. a loose, verbal statement of his affairs, which shewed a considerable surplus of assets over liabilities, but made no attempt to see D.'s books, or obtain particulars of the liabilities. P. then prepared a chattel mortgage for the $448 covering all D.'s stock, to the defendants, and it was executed by D. There was also some talk between D. and P. of D.'s seeing the defendants and by giving a larger mortgage obtaining further credit. On July 21st, P. wrote to the defendants giving them the figures furnished by D. and himself delivered the letter, and after perusal of this letter by the defendants, had them swear the affidavit of bona fides. The chattel mortgage was filed July 22nd. On July 23rd, D. consulted his own solicitor, who advised an assignment, which was made forthwith to the plaintiff. Action was brought to have chattel mortgage declared void under 10 Edw. VII. c. 64. D. swore at trial that at the time of the giving of the chattel mortgage his financial position was far from satisfactory and he knew he could not pay

all his debts. Defendant and P. both swore that they believed D.'s statement of his affairs and thought him solvent.

Held, applying the principle of *National Bank of Australia* v. *Morris* (1892), A.C. 290, that under the circumstances which had come to their knowledge, defendants if they did not actually know should have known that D. was insolvent; that D. was fully aware of his insolvency and that the chattel mortgage was given with the conjoint intent of giving defendants an unjust preference. Judgment accordingly declaring chattel mortgage void.

E. A. Dunbar, for plaintiff. *H. E. Rose*, K.C., for defendants.

NOTE.—The above judgment was confirmed on an appeal to the Divisional Court, Chancery Division, on March 13.—ED. C.L.J.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] FISHER *v.* JUKES. [March 3.

Appeal to Supreme Court—Leave to appeal—Special circumstances — Supreme Court Act, s. 71 — Discovery of new evidence.

The plaintiff had judgment in his favour which was affirmed by this court on appeal. During the reference to the Master to take the account ordered, the defendant for the first time noticed among the documents, which the plaintiff had produced before the trial, an affidavit which the plaintiff had made before the commencement of the action in which he had made a statement apparently at variance with his evidence at the trial. The trial judge's attention had been called to this affidavit at the trial, but he had not referred to it in his judgment, and it was not considered on the hearing of the appeal before this court.

Held, Cameron, J.A., dissenting, that, although this could not be treated as a discovery of new evidence warranting a new trial, yet it was such a special circumstance that, under s. 71 of the Supreme Court Act, this court might properly grant the defendant leave to appeal to the Supreme Court, after the lapse of time allowed for an appeal as of right.

Fullerton, for plaintiff. *Phillips*, for defendant.

Full Court.] GUNN v. VINEGRATSKY. [March 3.

Fraudulent preference—Action by judgment creditor of grantor to set aside—Parties to action—Assignments Act, R.S.M. 1902—Knowledge of solicitor, when imputed to client.

Held, 1. A judgment creditor has a right to bring an action to set aside a fraudulent preference given by the judgment debtor without setting up that his action in on behalf of all the creditors; and, if the action was commenced within sixty days after the date of the alleged fraudulent preference, the plaintiff is entitled to the benefit of the legal presumption created by s. 40 of R.S.M. 1902, c. 8, in such a case, viz., that a conveyance which has the effect of giving a preference over creditors or over one or more of them, shall be utterly void as against such creditor or creditors. *Ferguson* v. *Bryans*, 15 M.R. 170, distinguished.

2. Sub-sec. (*b*) of s. 48 of the Act, providing that one or more creditors may sue on behalf of all the creditors to set aside a fraudulent preference, has not taken away the right of a judgment creditor to sue on his own behalf.

3. When it is the duty of the solicitor of the alleged fraudulent grantee to divulge a fact as to the title, if he is aware of it, there is an irrebuttable presumption that he gave his client notice of that fact. *Rollond* v. *Hart*, L.R. 6 Ch. 678; *Real Estate* v. *Metropolitan*, 3 O.R., at p. 490, and *Schwartz* v. *Winkler*, 13 M.R. at p. 505, followed.

New trial ordered so that the question whether the defendant was entitled to the protection of s. 44 of the Act, by reason of having made "any present actual *bonâ fide* payment in money" might be determined.

W. L. Garland, for plaintiff. *F. M. Burbidge*, for defendant.

Full Court.] [March 3.

DOMINION EXPRESS CO. *v.* CITY OF BRANDON.

Taxation—Corporations Taxation Act—Business tax—Construction of statutes.

Appeal from the judgment of Macdonald, J., noted vol. 46, p. 547, allowed with costs and this injunction be granted dissolved, the court holding that the business tax imposed by the city, being a tax based on the rental value of the premises occupied, was not a tax similar to that imposed by the Corporation Taxation Act, R.S.M. 1902, c. 164, s. 3 (m).

Coyne, for plaintiff. *Henderson*, K.C., for defendants.

Full Court.] [March 3.

HEWITT *v.* HUDSON'S BAY CO.

Workmen's Compensation for Injuries Act, R.S.M. 1902, *c.* 178—*"Workman," meaning of—Trial by jury.*

Appeal from decision of Metcalfe, J., noted vol. 46, p. 749, dismissed without costs, the court being equally divided.

KING'S BENCH.

Mathers, C.J.] [February 14.

COX *v.* CANADIAN BANK OF COMMERCE.

Bills of exchange and promissory notes—Holder in due course —Bills of Exchange Act, s. 56*—Consideration.*

The plaintiffs were directors of the Finch Company, Limited, and had indorsed specially to the bank a promissory note of the company for $2,000 made payable to them, and intrusted it to Finch, general manager of the company, so that he might get it discounted at the bank.

The manager of the bank refused to discount it, but promised that, if it were left with him to hold as collateral to the indebtedness of the company on notes for $5,000 then current, the bank would allow the company to overdraw its account and would also discount some of its trade paper. Finch left the note with the bank on that understanding and the bank afterwards carried it out by allowing overdrafts to the extent of $895 and discounting the company's trade paper to the extent of over $3,300.

Held, 1. The bank, having become a holder of the note without notice of Finch's want of authority to pledge it as he did, would have been entitled to recover against the plaintiffs upon it, if value or consideration had been given for it. *Lloyd's Bank* v. *Cooke* (1907), 1 K.B. 794, followed. *Smith* v. *Posser* (1907), 2 K.B. 735, distinguished.

2. The existence of the antecedent debt was not of itself a sufficient consideration to support the promissory note of the plaintiffs given as collateral security therefor. *Crofts* v. *Beale,* 11 C.B. 172, and *McGillivray* v. *Keefer,* 4 U.C.R. 456, followed. *Currie* v. *Misa,* L.R. 10 Ex., at p. 162, distinguished.

3. The bank was entitled to hold the note for payment of any overdrafts allowed or discounts made on the strength of it, which were a sufficient consideration. *Oldershaw* v. *King*, 2 H. & N. 399, 517, and *Crears* v. *Hunter*, 19 Q.B.D. 341, followed.

4. As these had all been paid off, there was no consideration left, and the plaintiffs were entitled to a declaration that they were not liable to the bank on the note.

Coyne, for plaintiffs. *Dennistoun*, K.C., and *Craig*, for defendants.

Mathers, C.J.] [Feb. 15.

GRACE v. OSLER.

Building contract—Damages for delay in completion—Termination by owners of the employment of the contractors before completion—Liability of contractor for results of accident caused by his negligence.

When pursuant to the terms of a contract for the erection of a building, the owners terminate the contract before completion and take over and complete the work themselves, although it is a term of the contract that the contractors shall pay as liquidated damages a fixed sum for every day's delay in completion beyond the time fixed by the contract, no such damages should be charged to the contractors for any time beyond the date when the contract was so terminated and the work taken over, unless there is something in the contract to take it out of the principle laid down in 3 Halsbury's Laws of England, s. 514. *Yeadon Water Works Co.* v. *Burns*, 72 L.T. 538, followed.

Neither would the owners be entitled to unliquidated damages for delay beyond the date when they terminated the contract: 1 Hudson, 543.

The defendants terminated the contract and took over the work because the foundation gave way and the walls subsided in consequence of an accident for which the trial judge held the plaintiffs responsible. The plaintiffs commenced this action before the defendants had completed the building.

Held, that the action must fail and that the defendants were, under the contract, entitled on their counterclaim to the following classes of damages. (1) Any excess of the expense of completing the building according to the original plans and specifications over the unpaid balance of the contract price. (2) Damages caused by the accident to the owner of an adjoining building

which the defendants had been compelled to pay, the contract having provided for that. (3) Liquidated damages of $100 per day for the delay in completion up to, but not including, the date of the termination of the contract, such allowance to cover all claims for loss of business and rents or rent paid by defendants for other premises in the meantime. In completing the building, the defendants did not restore the original level of the floors, although this might have been done.

Held, that they could not recover the amount of any permanent injury to the selling value of the property caused by such unevenness, but only what it would have cost to restore such level.

Minty and *C. S. Tupper*, for plaintiffs. *Munson*, K.C., and *Haffner*, for defendants.

Book Reviews.

Burge's Commentaries on Colonial and Foreign Law, generally, and in their conflicts with each other and with the Law of England. New edition, under the editorship of ALEXANDER WOOD RENTON, one of the judges of the Supreme Court of Ceylon, and GEORGE GRENVILLE PHILLIMORE, Barrister-at-law, in six volumes. Vol. 3, on the subject of Marriage and Divorce. London: Sweet & Maxwell, Limited, 3 Chancery Lane; Stevens & Sons, Limited, 119 Chancery Lane. 1910.

The Comparative Law of Marriage and Divorce. Reprinted from vol. 3 of Burge's Commentaries on Colonial and Foreign Law. London: Sweet & Maxwell, Limited, 3 Chancery Lane; Stevens & Sons, Limited, 119 Chancery Lane. 1910.

These two volumes are the same. This monumental compendium of the law of marriage and divorce, treated comparatively as to all countries where there is any law on the subject, forms vol. 3 of Burge's well-known series of works on Colonial and Foreign Law. The original publication was in 1838.

The work deals with the law of marriage and divorce in the principal legal systems of the world, including the Roman Civil Law, the Canon Law, Roman Dutch Law, the ancient and modern French Law, the codes of Belgium, Italy, Spain, Germany, Austria, Hungary and Switzerland. The laws of the

British dominions and of the United States, as well as the Oriental systems in force in British India, Burmah, China, Japan and Siam are also contained therein.

As our readers may remember, the international aspect of the marriage state is now mainly regulated, at least for most of the nations of Europe, by the recent Hague Convention, so that it has to some extent assumed the aspect of a uniform private international law of marriage. England and the United States, however, have not as yet taken any part in framing an international agreement for the regulation of conflicts between the different national systems.

The scope of the work may be gathered from the headings of the following chapters, each of which refer to the various systems affected. I. Principal original systems of marriage law; II. Capacity for marriage; III. The marriage ceremony; IV. Nullity of marriage; V. Constitution of marriage—Private international law; VI. and VII. Personal capacities of husband and wife; VIII. to XV. Effect of marriage on property of husband and wife in relation to (1) Roman law; (2) Roman Dutch law; (3) French law; (4) The above named continental nations of Europe; (5) The law of Scotland; (6) The law of England; (7) The law of the British dominions, United States, India, Burmah, China, Japan, and Siam; (8) Private international law, in relation to the effect of marriage on the property of husband and wife. Chapters XVI. and XVII. deal with the subject of divorce. As to this, by the way, the Royal Commission on divorce, sitting in London has done its work and the report will be issued as soon as some statistics have been collected.

Marriage is undoubtedly the most important item in the personal relation of humanity and its constitutional attributes and consequences are pre-eminently interesting, not only to society at large, but to legislators and jurists; and this volume would appear to contain all that could possibly be said on these subjects.

Apart from its value in its legal aspect, this book is very interesting reading, and a great acquisition to any library.

Principles and Practice of the Law of Evidence. By W. BLAKE ODGERS, M.A., LL.D., K.C. With Canadian notes by the Hon. Mr. Justice RUSSELL, of Nova Scotia. London: Butterworth & Co., 11 and 12 Bell Yard, Temple Bar. 1911.

It was well that such an excellent work as Powell on Evidence should not be lost to the profession. Mr. Odgers, so well

fitted for the task, has taken the matter in hand and largely recast and re-written and so brought up-to-date Mr. Powell's book. The result is most satisfactory. To Canadians the value of the work has been largely enhanced by the introduction of Canadian notes by the Hon. Mr. Justice Russell. We need scarcely say that this has been done with great diligence and in his usual thorough and luminous manner.

The subject matter now appears under four main heads: Relevancy, Proof, Cogency and Procedure. The principles and practice of the law of evidence is stated under each head in large type, whilst the decisions illustrating the procedure and rules follow in small type, make it very comfortable reading, as well as handy for ready reference. The cases are brought down to March 1, 1910.

The matter contained in the Canadian notes has its own separate table of contents, of statutes, and of cases—a very convenient arrangement. These notes appear at the conclusion of the various chapters of the English edition. These references to the authorities in the various Canadian reports clear up many perplexing points in connection with the law of evidence, as it is in England, sometimes varied by the decisions of our own Courts. The result is that we have a complete and unique compendium of the law on the subject of evidence as applicable to this Dominion.

A Digest of Equity Jurisprudence. By J. ANDREW STRAHAN, M.A., LL.B., Barrister-at-law, and G. H. B. KENRICK, LL.B., Barrister-at-law, of the Middle Temple. 2nd edition. London: Butterworth & Co., 11 and 12 Bell Yard, law publishers, 1909.

As this is a second edition little need be said about this most useful manual except to remark that the authors are both examiners respectively in equity and common law at the University of London. The plan of the book is in the nature of a digest, stating concisely the legal propositions and rules of equity which are discussed. These are followed by notes referring to the authorities cited to prove the propositions. This is a book that should be in the hands of every student, and will be found most useful in every Law School as well to teachers as to learners.

Canada Law Journal.

VOL. XLVII. TORONTO, APRIL 15. No. 8.

A RECENT DECISION UPON THE LAW OF LANDLORD AND TENANT.

Fitzgerald v. *Mandas* is reported in 21 O.L.R. 312. As the case will not go any further, the defendant not having appealed from the verdict in favour of the plaintiffs, it is proposed to say a few words upon some points of law involved in the decision.

The facts are very simple. The plaintiffs by indenture leased property to the defendant for ten years from the 5th March, 1910, at a rental of $3,000 per annum payable monthly in advance; the defendant covenanted to pay rent, taxes, etc. The defendant was offered, but refused to take possession, and, after some negotiation as to the value of shelving, etc., repudiated the lease and refused to act under it.

The action was brought on the 7th April, 1910, immediately after the defendant's repudiation of the lease, claiming $500 for two gales of rent and damages for breach of contract. On 22nd April, 1910, the plaintiffs leased the premises to one Neeley, for a term commencing on 30th April at a rental of $175 per month. At the trial on 30th May, 1910, counsel for the defendant stated that he appeared only on the question of damages, admitting that his client was liable for same amount.

In a written judgment on 4th June, 1910, the learned trial Judge, after pointing out that there could be no question as to two gales of rent due when action was brought, said that the act of the landlord in leasing to Neeley could scarcely be called an eviction, as "to constitute an eviction at law the lessee must establesh that the lessor, without his consent and against his will, wrongly entered upon the demised premises, and evicted him and kept him so evicted," citing from Foa, 4th ed., at p. 166. The learned Judge went on to say: "Neither is this the case of the landlord taking advantage of the proviso for non-payment of

rent, which appears in the lease in the statutory form. Nor are we, in my judgment, embarrassed by considerations arising from the general relations of landlord and tenant. It is the case of two contracting parties, of whom the one expressly repudiates to the other the contract between them, and notifies him that he will not be bound by it. In such a case the law is well settled that the other party may thereupon treat the contract as at an end, except for the purpose of claiming damages for the breach of the same. *Hochster* v. *De la Tour*, 2 E. & B. 678, etc. . . The action then becomes a plain common law action for damages, the plaintiffs having elected to treat the contract as at an end except for the purposes of damages."

The learned Judge then proceeded to assess the damages on the basis of the difference in present value to the plaintiffs between the lease to the defendant and the lease to Neeley, and gave the plaintiffs a verdict for $10,982.87, including in that sum the rent due when the writ was issued.

One point in this judgment which seems to invite comment is the statement that the re-letting of the demised premises by the landlord could scarcely be called an eviction or a re-entry for breach of condition under the proviso in the lease. In the United States (except in New York) it appears to be well settled that if a tenant repudiates the lease, and abandons the demised premises, and the landlord re-enters and re-lets the property, crediting the tenant with the proceeds, such re-letting does not release the tenant from the covenants in his lease. Many cases in support of this doctrine may be found in "Cyc," vol. 24, p. 1165, to which may be added the recent case of *Higgins* v. *Street*, 92 Pac. Rep. 153, in which the rule is laid down, supported by a long list of authorities, that the lessee could not, by failure to perform the conditions of his lease, abrogate the contract, and thus secure the advantage of his own default and that the landlord had the right to take possession, and lease to another tenant, and that such action would not create a surrender by operation of law. That some such opinion was at one time entertained in England is shewn in the case of *Walls* v. *Atcheson*, 3 Bing. 462

(1826), in which the Court of Common Pleas is reported, very briefly, to have held that the plaintiff, having precluded the defendant from occupying his apartments by letting them to another, must be taken to have rescinded the agreement, and to have dispensed with the necessity for a surrender: that she ought to have given the defendant notice, if her intention was to let the apartments solely on his behalf.

But the writer has not been able to find any trace of this doctrine in any later English decisions.

In Foa, 4th ed., following the passage cited by the learned trial Judge from page 166 (supra) the author goes on to say: "But actual physical expulsion is not necessary: any act of a permanent nature done by the landlord with the intention of depriving the tenant of the enjoyment of the premises will be sufficient cause to constitute an eviction at law. Thus letting the demised premises, on their becoming empty during the term, to another person, unless the tenant has consented thereto, is a case in point." If the lease contains a proviso for re-entry upon the tenant's breach of covenant, then the landlord's action in re-letting after a breach has occurred would seem to be a re-entry under the proviso. And apart from any proviso for re-entry, the re-letting of abandoned premises by the landlord creates a surrender by operation of law.

But whether it be regarded as an eviction, a re-entry for breach of covenant, or a surrender by operation of law, it is submitted that, in England and in this Province, the re-letting of the demised premises, if vacant, by the landlord to a new tenant, determines the contract between the landlord and the first tenant and releases the latter from payment of subsequently accruing rent.

In *Nickells* v. *Atherstone*, 10 Q.B. 944 (1847), the facts were that defendant held premises as tenant to plaintiff under an agreement for three years; he left the premises in the first year, and being asked for payment of rent, authorized plaintiff to let the premises to anyone; plaintiff then let them to another tenant and gave him possession; the second tenant became bankrupt. Held, in an action of debt on the original agreement that

these facts constituted a surrender by operation of law, and defendant had a verdict. In *Oastler* v. *Henderson*, 2 Q.B.D. 575 Cockburn, C.J., said in the Court of Appeal: "The plaintiffs by letting the premises to a new tenant, put an end to defendant's term from that date." The two last mentioned cases with many others are cited in *Mickleborough* v. *Strathy*, 2 O.W.N. 537, in which the question for decision was whether upon the facts the tenant's liability upon the lease had been determined, either by eviction or by operation of law.

A month before the trial of *Fitzgerald* v. *Mandas*, the plaintiffs, as we have seen, re-let the premises to Neeley, and, according to the authorities mentioned, it would seem that by such re-letting the lease from the plaintiffs to the defendant, and all liability of the defendant for rent thereafter accruing were determined. If this be so, then it may perhaps be open to question whether the plaintiffs at the trial should have recovered more than the rent due at the commencement of the action, which being payable in advance covered the period up to the commencement of the new lease.

But this leads to the more serious question whether the doctrine of anticipatory breach of contract to be found in *Hochster* v. *De la Tour* and other decisions quoted in the judgment under discussion is properly applied to a case between lessor and lessee. Authority may be found which seems to be unfavourable to the view taken by the learned trial Judge. "It is not necessary to decide the point," said Bowen, L.J., in *Johnstone* v. *Milling*, 16 Q.B.D., at p. 474, "but I very much doubt whether the doctrine of *Hochster* v. *De la Tour* is applicable to such a case as this between lessor and lessee."

To the same effect is the positive judgment of our Court of Appeal in *Conolly* v. *Coon*, 23 A.R. 37. In that case Coon was tenant of Conolly's house under a verbal lease for a year at a rent payable monthly: after occupying and paying rent for five months, Coon moved out and sent the key to Conolly who refused to accept it, and at once sued Coon for breach of contract. The house remained empty until the trial eight months afterwards,

when Conolly obtained a verdict for $200. On appeal, the verdict was set aside and the action dismissed. Chief Justice Hagarty held that there was no surrender of the term either under the Statute of Frauds or by operation of law, and that while the term continued the landlord could not make any claim except for rent from month to month: the defendant's expressly renouncing and repudiating the tenancy could not in itself be a surrender and the term remains. "I cannot see," said the learned Chief Justice, "that any sound argument deducible from such cases as *Hochster* v. *De la Tour* can govern the case before us." Burton, J.A., concurred. Osler, J.A., also thought that there was no surrender in law or otherwise, and went on to say: "He (Coon) remained tenant, and though not bound to remain in actual possession, might have resumed possession whenever he chose. It would be a most extraordinary extension of the doctrine of *Hochster* v. *De la Tour* and cognate cases, were it to be held that, because the tenant chose to say that he repudiated the lease and would pay no more rent, the landlord might forthwith bring his action, and recover damages measured by the amount of the future gales of rent, treating what had occurred as an immediate breach of the entire contract between his tenant and himself. It might as well be said that the announcement by the maker of a promissory note, or of a covenant to pay a sum of money at a future time, that he would never pay it, or would refuse to pay it when due, would give rise to an immediate cause of action . . . The case of *Green* v. *McVicker*, 8 Bissell 13, comes nearest to the present case in its circumstances. It seems well decided, but the vital distinction is that there the agreement was to accept a lease of certain premises in the future for a term of two weeks. The intended lessee never entered, and before the time arrived for taking the premises gave notice to the intending lessor that he would not take or occupy them according to the agreement. The agreement was strictly executory on both sides, and a claim by the intended lessor for damages before the time when the lease was commenced was entirely within the principle of the

English authorities cited." Maclennan, J.A., was also clear that the case was not governed by *Hochster* v. *De la Tour* but was quite different. Mere repudiation, he thought, was no breach and gave the plaintiff no cause of action.

Is it possible to distinguish *Fitzgerald* v. *Mandas* from *Conolly* v. *Coon* in that, in the latter case, the defendant entered and occupied the demised house for five months before he abandoned it, while, in the former case, Mandas, having become a party to an indenture of lease containing a demise of property for ten years, never entered under the lease, though he did not actually repudiate it until after the commencement of the term? Mandas had only an interesse termini, not a term in the demised property. Could he before entry get rid of his interest and determine his tenancy by a verbal repudiation? If he could not, then the principle so clearly laid down in *Conolly* v. *Coon* should apparently govern his case.

The inchoate right which the grant of a lease confers before entry upon the lessee is not a mere right arising out of contract, but a right of property, which gives him a cause of action against any person through whose act his entry or the delivery of possession to him may have been prevented. It is a right in rem alienable at common law and one which passes to the executor. *Gillard* v. *Cheshire Lines Committee*, 32 W.R. 943—(a judgment of the Court of Appeal). It is not an estate, but a right to an estate (*Doe* v. *Walker*, 5 B. & C. 111), and a conveyance by the lessee to the lessor will operate as a release and not as a surrender. In the case of an interesse termini the common law rule which requires a re-entry to divest an estate for forfeiture does not apply (*Carnegie* v. *Philadelphia*, etc., 158 Penn. St. 317).

Perhaps the best definition of an interesse termini and its incidents may be found in Bacon's Abridgment under Leases(*M*), part of which is as follows: "The lessor having done all that was requisite on his part to divest himself of the possession and pass it over to the lessee thereby transferred such an interest to the lessee as he might at any time reduce into possession by actual

entry, as well before as after the death of the lessor, and such an interest as he might before entry grant over to another, or if he died before entry would go to his executors, or if the grant were made to two jointly, to the survivor and his executors, any one of whom might enter at their pleasure and so reduce the contract into an actual execution, for it was perfect and complete on the lessor's part, and the perfecting of it on the lessee's part was entirely in his own power and left to his own discretion, to use when and as he saw fit."

Such then was the interest which the defendant Mandas had in the demised premises at the time of his repudiation of the lease, and there can not, it is submitted, be much doubt that it is an interest in lands within the meaning of the Statute of Frauds, R.S.O. 1897, c. 338, and which cannot be granted, assigned or surrendered except by deed or note in writing or by operation of law.

Thus it may be argued that the defendant's oral repudiation of the lease was ineffectual as an assignment or release of his interest in the demised premises, and that this interest continued until determined by the act of the landlords in leasing to Neeley. It would seem then that the relationship of landlord and tenant existed when the action was brought and continued to exist until the re-letting to Neeley, and it would follow that the claim of the landlords in that action would be limited necessarily to the rent in arrear when the writ was issued, for, in the words of Mr. Justice Maclennan, the attempted repudiation was no breach, and gave the plaintiff no additional cause of action.

It is submitted, therefore, with very much respect that the doctrine of anticipatory breach of contract was not applicable to the facts of *Fitzgerald* v. *Mandas* and that the plaintiff's verdict should not have been for more than $500 and interest. It must be borne in mind, however, that the defendant at the trial evidently did not raise the points discussed here, and apparently invited an assessment of damages in favour of the plaintiffs along the lines followed by the learned trial Judge. But as the case has found its way into the reports, it may not be amiss to point out that the soundness of the reasons given for the decision is perhaps not altogether free from doubt.

HON. MR. JUSTICE GIROUARD.

We exceedingly regret to record the death of Mr. Justice Girouard on the 22nd ult., at his residence in Ottawa from the effect of injuries resulting from an accident the week previously.

Mr. Girouard was born in the Province of Quebec on July 7, 1836. He was called to the Bar in 1860 and appointed to the Bench of the Supreme Court of Canada in October, 1895, taking the place of Mr. Justice Fournier. Mr. Girouard, who was one of the leaders of the Bar in the Province of Quebec, was also a man of great industry, and contributed largely to literature, both legal and lay, in his own province; and in connection with these labours he published a work on the law of marriage, and was one of the editors of *La Revue Critique*, which contained many interesting articles on constitutional law. Mr. Girouard was also at that time a valued contributor to this journal. We referred more fully to his career at the time of his appointment to the Supreme Court Bench in 1895 (C.L.J., vol. 31, p. 526).

The high appreciation in which this learned judge was held was alluded to by Sir Charles Fitzpatrick, Chief Justice of the Supreme Court at the meeting of the court on the morning after his death. Hon. Wallace Nesbitt, K.C., who was recently a judge of the same Court, replied on behalf of the Bar.

Sir Charles Fitzpatrick said: "It is my painful duty to announce the death of Mr. Justice Girouard, which occurred this morning. By date of appointment our deceased colleague was the senior member of this court, and in him we lose one whose sound judgment and ripe experience were of inestimable value. Deep regret will be felt at his unexpected death, not only here and in the Province of Quebec, with the public and professional life of which he was so honourably connected, but throughout Canada, among all those who are interested in the work of this court. Those of us who come from Quebec felt with great pride that in him we had a fit representative of the best traditions of our Bar and Bench. His great knowledge of the civil law and his wide experience as a commercial lawyer made him a valued member of a tribunal in which appreciation of many diverse

forms of law is essential. His career has been one of varied and uninterrupted success. In Parliament he quickly made his mark as a fearless and independent representative of the people, and in this court he justified the great expectations of his friends. Proud of his French origin, and true to the best traditions of his race, he was blessed with a width of outlook not given to everyone, but which is one of the most valued attributes of a judge. It was his pride to maintain an affinity with literature and culture, and his name is connected with legal and historical works that will live after him."

CRIME AND THE PRESS.

The following abstract from one of our English exchanges, under the above heading tells its own story. We have frequently referred to this subject as being one of national interest and a growing evil. If things are as bad as stated in conservative England, they are necessarily worse in this country, where the press exercises greater license, and is not so subject to a wholesome public opinion. It will be noted that the opinion expressed as to this evil in England comes from an official who is dealing with an important subject from a Governmental point of view.

The article is as follows:—

"A recently-issued Blue Book (Part I. of the Judicial Statistics for England and Wales for 1909) is of unusual importance, by reason of the valuable introduction by Mr. Simpson, the Chief Clerk of the Home Office, one of our leading authorities, whose long experience qualifies him to deal ably with such figures as appear in the volume. His sad testimony is that, in the last decade, there has been a steady increase of crime, which he attributes largely to "the general relaxation in public sentiment with regard to crime," and the baneful influence of the Yellow Press in feeding the depraved taste *with shameless details of crime*, and *elaborate pictorial representations of criminals*, as well as by comments from which a moral tone is absent. Thus abused, the 'freedom of the press' becomes a national peril."

LAW SOCIETY OF UPPER CANADA.

The recent election of Benchers has resulted in the selection of the following members of the Bar. It will be seen that several excellent names not hitherto on the Bench now appear on the list.

F. W. Harcourt, K.C., Toronto; Hon. A. G. Mackay, K.C., M.P.P., Owen Sound; C. A. Moss, Toronto; Sir George C. Gibbons, K.C., London; T. C. Robinette, K.C., Toronto; E. Douglas Armour, K.C., Toronto; A. H. Clarke, K.C., M.P., Windsor; James Bicknell, K.C., Toronto; Geo. Lynch-Staunton, K.C., Hamilton; W. R. White, K.C., Pembroke; F. H. Chrysler, K.C. Ottawa; T. Herbert Lennox, K.C., M.P.P., Aurora; Hon. Wallace Nesbitt, K.C., Toronto; C. A. Masten, K.C., Toronto; J. M. Glenn, K.C., St. Thomas; E. F. B. Johnston, K.C., Toronto; A. E. H. Creswicke, K.C., Barrie; N. W. Rowell, K.C., Toronto; I. F. Hellmuth, K.C., Toronto; William Proudfoot, K.C., Goderich; J. E. Farewell, K.C., Whitby; W. A. Logie, K.C., Hamilton; W. S. Brewster, K.C., M.P.P., Brantford; F. E. Hodgins, K.C., Toronto; John Cowan, K.C., Sarnia; W. F. Kerr, Cobourg; W. D. McPherson, K.C., M.P.P., Toronto; H. H. Dewart, K.C., Toronto; W. B. Northrup, K.C., M.P., Belleville; W. H. McFadden, K.C., Brampton; A. C. McMaster, Toronto; Matthew Wilson, K.C., Chatham.

Messrs. Gibbons and Clarke having been elected at four quinquennial elections are by statute entitled to sit as ex officio Benchers.

WORKMEN'S COMPENSATION ACT.

Of the multifarious points to which at least fifteen sections of the Workmen's Compensation Act, 1906 (6 Edw. VII. c. 58), and the voluminous schedules thereto are bound to give rise, the one that most frequently engages the attention of the Court of Appeal is whether an accident complained of as entitling a workman—or his dependents in the event of his death—to compensation arose "out of" as well as "in the course of" the employment of the workman. The reason for this is obvious enough. In every case the burden lies on the applicant for compensation

of proving—not necessarily by direct evidence, for it is well established that inferences of fact may be drawn by the court—that the personal injury to the workman was caused by an accident which arose in that manner. Mere surmise, conjecture, or guess does not suffice. Otherwise the claim for compensation must fail. Thus, among the batch of cases under the Act which came lately before the Court of Appeal, three of more than usual interest turning on that precise point were decided. In the first, that of *Hawkins* v. *Powell's Tillery Steam Coal Company,* noted ante, p. 439, the Court of Appeal had the difficulty of choosing between following the decision of the House of Lords in *Clover, Clayton and Co.* v. *Hughes,* 102 L.T. Rep. 340, (1910) A.C. 242, or in *Barnabas* v. *Bersham Colliery Company,* 103 L.T. Rep. 513. The workman in the former, suffering from an aneurism in so advanced a state that it might have burst at any time, ruptured the aneurism while doing his work in the ordinary way without any unusual exertion or strain. The requirements of the Act were, nevertheless, held to be fulfilled. On the other hand, a contrary conclusion was arrived at in *Barnabas's* case, where the workman, while performing his ordinary duties in the ordinary way, had an apoplectic seizure, from which he died shortly afterwards. In *Hawkins's* case the learned judges of the Court of Appeal preferred to take the decision in *Barnabas's* case as their guide. The dependents of the deceased workman there had not, their Lordships thought, succeeded in proving, by direct evidence or by necessary inference from the facts, that the death of the workman from angina pectoris was caused by an accident that arose "out of," as well as "in the course of," his employment. Whether or not there is any real distinction between the two lines of authority, or whether there has been merely a change of front, it is superfluous now to go into; but in all probability it will be seen that in this class of case in the future more importance will be attached to the later decision of the House of Lords than to the earlier one. The question to be determined in *Pierce* v. *Provident Clothing and Supply Company, Limited,* noted ante, p. 459, the second case to which we referred above, was based on circumstances of an entirely different nature. A workman,

while riding a bicycle in the course of his employment as a canvasser and collector, was knocked down by an electric tramway car and killed. Influenced by the principle of the recent decision of the Court of Appeal in *Warner* v. *Couchman*, 103 L.T. Rep. 693, the learned County Court judge took the view that the workman was not more exposed to the risk of an accident in the streets than any other member of the population; and that, therefore, the accident which occurred to him did not arise "out of" his employment. The Court of Appeal reversed the decision of the court below, and held that the dependent of the deceased had discharged the inevitable obligation of shewing that the accident had so arisen. The workman was, their Lordships considered, more exposed to accident than others because his occupation took him into the streets practically all day long. The fact that he rode a bicycle, which was a permitted way of doing his rounds, was rather more risky than travelling on foot, did not seem to the court to have any bearing on the point. The Scotch case of *McNeice* v. *Singer Sewing Machine Company, Limited*, 48 Sc. L. Rep. 15—an authority directly in point—was accepted as one that ought to be followed. A collector, forced to traverse the streets by his occupation, met with one of the ordinary dangers to which that employment exposed him. And although many members of the public are exposed to the same danger, it was held to be one arising "out of" the employment. The third case—*Astley* v. *R. Evans and Co., Limited*, Ct. of App., Feb. 28—gave the court the opportunity of very clearly enunciating the principles upon which it should act in dealing with the point which we have been discussing; and the case, when fully reported, will doubtless be regarded as an invaluable guide by the County Court judges.—*Law Times.*

PRISONERS TESTIFYING ON THEIR OWN BEHALF.

Two recent murder trials at the Old Bailey will no doubt serve to bring sharply before the mind of the public the wide change that has taken place in our criminal procedure during the past twelve years, and, although the profession is well aware of this radical alteration, we do not think that until the last six

months this change has been in general really appreciated. Although the Criminal Evidence Act, 1898, was cautiously drafted and every effort was made for the purpose of safeguarding prisoners, it cannot be denied that the forecasts made as to the effect of that measure when it was before Parliament have been amply proved accurate. It has always been our boast, so far as the administration of our criminal law is concerned, that a prisoner must be deemed to be innocent until he is proved guilty of the specific crime with which he charged, and that the onus is upon the prosecution to prove his guilt of such specific crime without a shadow of a doubt. The effect of the Act of 1898 has been imperceptibly and gradually to change that position, and to a large extent nowadays the onus of proving his innocence in many cases in fact falls upon the accused.

This has been brought about by the fact that juries are well aware that a prisoner can go into the witness-box, and, if he does not do so, are apt to draw unfavourable conclusions therefrom, although his omission to give evidence cannot be made the subject of comment. Further, where the prisoner does elect to give evidence on oath, he often does not make the best of witnesses when subjected to cross-examination. This is so whether he be innocent or guilty, for a person charged with a serious offence, who possibly has been confined to prison for weeks before his trial, cannot be supposed to be in the best mental condition for doing himself entire justice. An even more difficult position is created by the statute by the provision which allows cross-examination as to previous convictions and character where the accused "has personally, or by his advocate, asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution."

In this way, if the prisoner's past does not bear investigation, the defence is undoubtedly placed in a very difficult position, which becomes more accentuated the more disreputable the witnesses for the prosecution may be.—*Law Times.*

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

ADMIRALTY—BILL OF LADING—INCORPORATION INTO BILL OF LADING OF CONDITIONS OF CHARTER-PARTY—ARBITRATION CLAUSE —STAYING ACTION.

The Portsmouth (1911) P. 54. In this case, the action was to recover for demurrage and was stayed on the ground that by the terms of the charter-party, which were incorporated in the bill of lading, in case of dispute the matter was to be referred to arbitration. The reference in the bill of lading was as follows: "he or they paying freight for the goods with other conditions as per charter-party," "Deck load at shippers' risk and all other terms and exceptions of charter to be as per charter-party, including negligence clause." The charter-party provided for payment of demurrage and "any dispute or claim arising out of any of the conditions of this charter-party shall be adjusted at the port where it occurs, and the same shall be settled by arbitration. A Divisional Court affirmed the order staying the action, (1910) P. 293, but the Court of Appeal (Williams, Buckley, and Kennedy, L.JJ.) were of the opinion that the arbitration clause in the charter-party only applied to disputes arising under the charter-party and could not by inference be extended to apply to disputes arising under the bill of lading. The decision of the Divisional Court was therefore reversed.

FIXTURES—MANSION HOUSE — WOOD CARVINGS ATTACHED TO HOUSE—RIGHT OF REMOVAL OF WOOD CARVINGS ANNEXED TO FREEHOLD.

Re Chesterfield (1911) 1 Ch. 237. In this case a mansion house was by the will of a testator settled to certain uses in strict settlement. Attached to the walls of the mansion house, by nails or pegs as ornamental decorations, were certain wood carvings by Grinling Gibbons. The testator by his will bequeathed to the tenant for life all his books, pictures and other works of art or curiosity, and generally all goods and effects in or about the mansion house. The tenant for life sold the mansion house, reserving the wood carvings, which he removed and sold a portion of them, claiming to be absolutely entitled to the proceeds

thereof, but Joyce, J., held that the carvings did not pass by the bequest of chattels, but having been fixed to the inheritance so as to form part of the house, the proceeds of sale must be treated as capital money subject to the trusts of the settlement.

WILL—SETTLEMENT—POWER—ABSOLUTE INTEREST IN DEFAULT OF APPOINTMENT—EXERCISE OF POWER—"DEVISE, BEQUEATH AND APPOINT"—TRUSTS FOR PERSONS NOT OBJECTS OF POWER—CHILD EN VENTRE SA MERE—POSTHUMOUS CHILD—WILLS ACT, 1837 (1 VICT. C. 26) S. 33—(10 EDW. VII. C. 37, S. 37, (ONT.)).

In re Griffiths, Griffiths v. *Waghorne* (1911) 1 Ch. 246. Two points were decided. First, that where a testator has under a settlement a power of appointment in favour of his children, and in default of appointment the fund belongs absolutely to himself, and he devises and bequeaths and appoints the fund to trustees after payment of his debts and funeral expenses to divide the same equally between his children, the word "appoint" in such a case is not to be construed strictly as an exercise of the power, but as a dealing by the testator with the fund as his own property as he was entitled to do in default of appointment. And the second point was this: One of the testator's sons predeceased him leaving a child who was en ventre sa mère at the time of the testator's death, and Joyce, J., held that under s. 33 of the Wills Act, 1837 (see 10 Edw. VII. c. 37, s. 37 (Ont.)) the legacy to the deceased son did not lapse, but passed under his will, the posthumous child though not born, nevertheless being "living" at the time of his parent's death.

BILL OF SALE—REVERSIONARY INTEREST IN CHATTELS—ASSIGNMENT BY REVERSIONER OF HIS REVERSIONARY INTEREST IN CHATTELS—"CHOSES IN ACTION"—REGISTRATION.

In re Thynne, Thynne v. *Grey* (1911) 1 Ch. 282. This was a question between the assignee of a reversionary interest in chattels and the trustee in bankruptcy of the assignor the latter claiming that the assignment was void as against him for non-registration under the Bills of Sale Act. Neville, J., held that the interest assigned was a mere chose in action and therefore under s. 4 of the Bills of Sale Act, 1878, exempt from the operation of the Act.

TRUSTEE—BREACH OF TRUST—POWER TO EMPLOY AGENTS—CHEQUE PAYABLE TO SOLICITOR—MISAPPROPRIATION BY SOLICITOR OF TRUSTEE—LIABILITY OF TRUSTEE—"HONESTLY AND REASONABLY"—JUDICIAL TRUSTEES ACT, 1896 (59-60 VICT. C. 35) S. 3—(62 VICT. C. 15, S. 1 (ONT.)).

In re Mackay, Griesseman v. *Carr* (1911) 1 Ch. 300. In this case trustees under a will had express power to employ agents to act for them under the will. One of the trustees was a solicitor, and managed the estate, and on his death the survivor instructed another firm of solicitors to act for the estate; and at the new solicitor's request he signed cheques payable to him for considerable sums which were said to be wanting for death duties, and the solicitor misappropriated the proceeds of these cheques. The action was brought to compel the trustee to make good the loss, but Parker, J., held that the defendant was justified in believing that having regard to the terms of the will he might safely pay the money to the solicitor; and that in so doing he acted "honestly and reasonably" and ought to be excused under the Judicial Trustees Act, 1896, s. 3 (see 62 Vict. c. 15, s. 1 (Ont.)).

HUSBAND AND WIFE—GIFT OF INCOME DURING WIDOWHOOD—MARRIAGE WITH DECEASED'S SISTER'S HUSBAND—UNLAWFUL MARRIAGE SUBSEQUENTLY VALIDATED BY STATUTE—DECEASED WIFE'S SISTER'S MARRIAGE ACT, 1907 (7 EDW. VII. C. 47) SS. 1, 2.

In re Whitefield, Hill v. *Mathie* (1911) 1 Ch. 310. This is an instance of a curious legal complication which has arisen from the passage of the Act authorizing and validating marriages with a deceased wife's sister, and which is productive of a somewhat paradoxical result. The facts were that a testator died in 1902 leaving property to trustees on trust to pay the income to his widow while she remained unmarried. The widow subsequently went through a form of marriage with her deceased sister's husband, but the trustees continued to pay her the income on the ground that such marriage being unlawful she was still "unmarried," but when the Act in question was passed validating the marriage, they ceased to pay her, because she had by virtue of the Act become married; but the Act provides, that no right, title, estate or interest whether in possession or expectancy, and whether vested or contingent at the time of the passing of this Act, existing in, to or in respect of any pro-

perty, and no act or thing lawfully done or omitted before the passing of the Act shall be prejudicially affected by reason of any marriage heretofore contracted as aforesaid being made valid by the Act; and Parker, J., held that the effect of this proviso was to preserve the lady's right to the income; so that although she is now lawfully married she is still entitled to the income as if she were not married.

SETTLEMENT—POWER OF APPOINTMENT—CESSER OF INTEREST OF HUSBAND—ABSENCE OF DIRECTION AS TO INCOME DURING HUSBAND'S LIFE AFTER CESSER OF HIS INTEREST—CHILDREN OF MARRIAGE ENTITLED PENDING APPOINTMENT.

In re Master, Master v. *Master* (1911) 1 Ch. 321. In this case under a marriage settlement the husband was in the events which had happened entitled to the income of the trust fund for life or until he became bankrupt, and subject thereto the trustees were to hold the income upon trust for the children or other issue of the marriage as the spouse or the survivor of them should by deed or will direct. The wife was dead, the husband had become bankrupt and gone off to Australia and so far as known no appointment had been made. There were three children of the marriage all of whom were of age and one of them was married and had three children. On an application by the trustees for advice as to how they should deal with the income during the life of the husband, and pending the exercise of the power of appointment, Eve, J., held that it was distributable in equal shares amongst the children of the marriage until and unless that disposition should be superseded by the exercise of the power.

CONTRACT—FRAUD—SALE OF GOODS—VOIDABLE CONTRACT—GOODS OBTAINED BY FRAUD—SALE TO INNOCENT PURCHASER—ONUS OF PROOF—POWER GIVEN TO PASS PROPERTY IN GOODS.

Whitchorn v. *Davison* (1911) 1 K.B. 463 was an action of detinue to recover goods in the following circumstances. The goods in question consisted of a pearl necklace, which the plaintiffs entrusted to one Bruford, on the representation that he had a customer in view who would purchase it. The necklace was in the first place handed to him on this representation, which was false, on the terms that he was to return it, or pay the agreed price. Instead of selling it, he pledged it with the defendant for an advance of money, and he subsequently made

a bargain with the plaintiffs that he was himself to be the purchaser and they accepted from Bruford his bills of exchange for the price, on the representation that the necklace had been actually sold to a customer, and that Bruford could not approach him, to ask for cash, without insinuating a doubt as to his bona fides. Bruford then obtained a further advance from the defendants and absconded, and the bills he had given were, of course, dishonoured. The plaintiffs demanded the necklace from the defendants, but they refused to give it up. The jury found as a fact that Bruford obtained the necklace by fraud, with the intention of stealing it, and that it was one of the terms on which he got possession that the property in it should not pass until the plaintiffs were paid cash, and that the defendants did not advance the moneys in good faith and without notice of the fraud, Bray, J., at the trial having charged the jury that the onus was on the defendants to shew that they had made the advances in good faith and without notice of the fraud of Bruford. On these findings Bray, J., gave judgment for the plaintiffs, but the Court of Appeal (Williams, Buckley, and Kennedy, L.JJ.) unanimously reversed his decision, and gave judgment for the defendants, being of opinion that, though the goods may have been obtained in the first place by a trick which would constitute larceny, yet the subsequent sale to Bruford amounted to a contract authorizing him to pass the property, and this gave him a right which fed the defendant's title, notwithstanding the contract was voidable for fraud; it being held that after this contract the goods could not be deemed to have been stolen, but to have been obtained by fraud or false pretences. Such being the case, the Court of Appeal held that the onus was on the plaintiffs to shew that the advances had not been made by the defendants bonâ fide and of that there being no evidence, the findings of the jury were set aside and the action dismissed. There is an interesting discussion in the judgment of Buckley, L.J., as to the difference betwen larceny by trick, and obtaining goods by fraud or false pretences, as affecting the question of the right of property in goods.

CONTRACT—FRAUD—SIGNATURE TO CONTRACT OBTAINED BY FRAUD —DOCUMENT SIGNED ON MISREPRESENTATION AS TO ITS CONTENTS — GUARANTEE — NON EST FACTUM — NEGLIGENCE — ESTOPPEL—PROXIMATE CAUSE OF LOSS.

Carlisle & Cumberland Banking Co. v. *Bragg* (1911) 1 K.B. 489. This was an action on a guarantee and the defence set up

was non est factum. It appeared by the evidence that one Rigg, on the representation that the document in question was an insurance paper, had got the defendant to sign a paper purporting to be a continuing guarantee to the plaintiff for any debt due by Rigg to the plaintiff up to £150; the defendant signed the paper without reading it, and Rigg subsequently forged the name of another person as an attesting witness to it and handed it to the plaintiffs. The jury found that the defendant did not know the paper was a guarantee, but was guilty of negligence in signing the paper, and that Rigg was not the agent of the bank. On these findings, Pickford, J., gave judgment for the defendant, which was affirmed by the Court of Appeal (Williams, Buckley and Kennedy, L.JJ.), that court holding that the defendant was not estopped from denying that he had contracted to guarantee the debt of Rigg, as he owed no duty to the plaintiff in the matter, and that the proximate cause of the plaintiffs' loss was the fraud of Rigg, and not the negligence of the defendant.

BAILMENT—BAILEE—CLAIM BY THIRD PARTY TO GOODS BAILED—DUTY OF BAILEE—NOTICE OF CLAIM OF BAILOR—NOTICE TO BAILOR OF CLAIM OF THIRD PARTY—ORDER OF MAGISTRATE FOR DELIVERY OF GOODS.

Ranson v. *Platt* (1911) 2 K.B. 499. The plaintiff in this case was a married woman and she had delivered to the defendant, a warehouseman, certain goods for safe keeping. Subsequently the husband of the plaintiff went to the defendant and demanded the goods, claiming that they were his property. The defendant refused to give them without a magistrate's order and he attended before a magistrate with the husband and informed the magistrate that he had received the goods from the wife. A summons was then taken out under the Metropolitan Police Courts Act, and served on the defendant, but he gave no notice of it to the plaintiff; on its return the husband deposed that the goods were his and were worth £10 and the magistrate made an order for their delivery to him, and they were delivered accordingly. The County Court judge gave judgment for the plaintiff, but the Divisional Court (Darling, Phillimore and Bucknill, JJ.) reversed his decision, Darling, J., dubitante, who thought the defendant ought to have given notice of the husband's claim to the plaintiff. The majority of the court, however, thought that he had sufficiently discharged his duty by informing the magistrate that he had received the goods from the plaintiff. Probably the magistrate failed to realize that husband and wife are no longer one.

LANDLORD AND TENANT—HOUSE LET FOR IMMORAL PURPOSE—RIGHT TO RECOVER RENT.

Upfill v. *Wright* (1911) 1 K.B. 506. This was an action to recover rent for a flat. The premises had been let by the plaintiff's agent to the defendant for a term of three years. The agent knew that the defendant was the mistress of a certain man, from whom the rent would probably come and who, he knew, was a constant visitor at the flat; after the expiration of the term, the defendant continued as tenant from year to year. In these circumstances the judge of the County Court gave judgment for the plaintiff; but the Divisional Court (Darling and Bucknill, JJ.) overruled it, holding that the premises had been let to the plaintiff's knowledge for the purposes of prostitution.

RENT CHARGE—TERRE-TENANT—MORTGAGEE IN FEE NOT IN POSSESSION—LIABILITY OF MORTGAGEE FOR RENT CHARGE.

In *Cundiff* v. *Fitzsimmons* (1911) 1 K.B. 513, a Divisional Court (Darling, and Bucknill, JJ.) affirmed the judgment of a judge of a County Court, holding that where a mortgage in fee subject to a rent charge is made, the mortgagee thereby becomes as terre-tenant personally liable to pay the rent charge, notwithstanding he has not entered into possession.

POISON—SALE BY UNLICENSED ASSISTANT — LIABILITY OF UNLICENSED SALESMAN TO PENALTY.

Pharmaceutical Society v. *Nash* (1911) 1 K.B. 520. By the English Pharmacy Act, 1908, "so much of the Pharmacy Act, 1868, as makes it an offence for any person to sell . . . poison unless he is a duly registered pharmaceutical chemist, shall not apply in the case of "certain specified" poisonous substances to be used exclusively in agriculture or horticulture . . . if the person so selling . . . is duly licensed for the purpose" under that section. In this case, a shopman of a person duly licensed had sold poisonous matter for horticultural purposes, not being himself duly licensed, and the question was, whether he was liable to the penalty imposed by the Act, and Phillimore and Harridge, JJ., held that he was.

EXERCISE OF STATUTORY POWERS—DAMAGE TO LAND—OFFER BY PROMOTERS—CONDITIONAL OFFER—LAND CLAUSES CONSOLIDATION ACT, 1845 (8-9 VICT. C. 18) S. 34—COSTS OF ARBITRATION.

Fisher v. *Great Western Ry. Co.* (1911) 1 K.B. 551. This was an action to recover a sum awarded by arbitrators for dam-

age occasioned by expropriation of land for a railway, together with the costs of the arbitration, and the only point in question was whether the costs ought to have been awarded. The defendant company under statutory powers diverted a public foot-path The plaintiff claimed compensation for injury to his land. Prior to arbitration, the defendants sent a letter to the plaintiff's solicitor to this effect: "The company have made arrangements for the construction of a forty-foot road, which will put your client's property in direct connection with the new bridge and will more than counterbalance any injurious affection of that property by reason of the closing of the old foot-path. The road will be made as soon as practicable, and on the understanding that it will be made, we will make your client the offer of £50 in settlement of his claim." This offer was refused and the parties proceeded to arbitration, in which £50 was awarded to the plaintiff as compensation. Sometime before the hearing of the arbitration the forty-foot road was constructed. Phillimore, J., held that the offer was not a good offer under the Land Clauses Act, 1845, s. 34, and that the plaintiff was entitled to recover his costs of the arbitration and the Court of Appeal (Lord Alverstone, C.J., and Buckley, and Kennedy, L.JJ.) affirmed his decision, being of the opinion that the offer was embarrassing.

MANDAMUS—INTEREST OF PROSECUTOR—STATUTORY DUTY IMPOSED AT INSTANCE OF THIRD PARTIES—RIGHT OF THIRD PARTIES TO ENFORCE STATUTORY DUTY IMPOSED AT THEIR INSTANCE.

The King v. *Manchester Corporation* (1911) 1 K.B. 560. This was an application for a peremptory mandamus commending the defendant to make a by-law in accordance with the terms of a statute. In the year 1900, the defendants had applied to Parliament for power to construct additional tramways, and an insurance company opposed the bill and at its instance a clause was inserted providing for the making of by-laws by the corporation prescribing the distances at which carriages using the tramways shall be allowed to follow each other. The corporation purporting to act under this power, passed a by-law providing that, in the central area, "the distance at which a carriage shall follow a preceding carriage shall be such as may be directed by the police." The police gave no direction as to the distance at which carriages may follow one another, but the constables on duty regulated the traffic in the usual way. Owing to the lack of prescription of distance, the central area

became congested and collisions frequently occurred and the insurance company was frequently obliged to pay damage claims in consequence. The insurance company thereupon applied for a mandamus to compel the corporation to make a proper by-law as contemplated by the statute and the question was raised by the defendants whether the insurance company had a sufficient interest to entitle them to invoke the aid of the Court in the way asked. A Divisional Court (Lord Alverstone, C.J., and Pickford, J., and Avory, JJ.) held that they had, but Avory, J., doubted as to whether the applicant had sufficient interest; all the members of the court were agreed that the by-laws made by the corporation do not prescribe the distance at which tramcars should be allowed to follow one another.

SHIPPING — SEAMAN — NEGLECT OF DUTY — OMISSION TO DO ACT NECESSARY FOR PRESERVATION OF SHIP—MERCHANT SHIPPING ACT, 1894 (57-58 VICT. C. 60), S. 220.

Deacon v. *Evans* (1911) 1 K.B. 571. This was a proceeding before a magistrate, under the Merchants Shipping Act, 1894, s. 220. By that section, "If a master, seaman, or apprentice, belonging to a British ship . . . by neglect of duty . . . omits to do any lawful act proper and requisite to be done by him for preserving the ship from immediate loss, destruction or damage," he shall be guilty of a misdemeanour. The evidence shewed that the ship on which the defendant was engaged as master had come into collision with another vessel and suffered damage owing to the defendant placing the look-out man in such a position on deck, that his view ahead was partially obstructed. On a case stated by the magistrate, it was held by a Divisional Court (Lord Alverstone, C.J., and Hamilton and Avory, JJ.), that this was not an offence of the kind contemplated by the Act, neither was the omission of the master to keep a proper look-out himself.

DAMAGES—CONTRACT—SALE OF GOODS—ACT DONE BY PLAINTIFF IN MITIGATION OF DAMAGES—PROFIT ACCRUING THEREFROM TO THE PLAINTIFF.

British Westinghouse Co. v. *Underground Ry. Co.* (1911) 1 K.B. 575. This was a case stated by an arbitrator. The defendants had contracted to buy from the plaintiffs certain electrical machines for the purpose of operating an electric railway. The machines were to be according to a certain specified standard. The machines delivered were not up to the required standard,

and were defective in design and efficiency and did not comply with the contract and specifications. The defendants nevertheless accepted the machines and used them, reserving their right to damages for breach of the contract. The plaintiffs endeavoured to make one of the machines efficient and up to the required standard, intending, if successful, to make corresponding improvements in the rest of the machines, but their efforts proved unsuccessful, and the defendants thereupon replaced the machines with those of one Parsons, which proved greatly superior to those furnished by the plaintiffs and moreover effected a great saving of expense to the defendants. The question was, on what principle the damages for the breach of contract should be assessed in these circumstances? The plaintiffs contended that the commercial life of the machines furnished by them ought to be deemed to have expired when the Parsons machines were purchased and that the cost of the Parsons machines was not recoverable as part of the damages. The defendants on their part claimed that the commercial life of the machines furnished by the plaintiffs was not at an end when the Parsons machines were bought, but that the effect of the defendants purchasing the Parsons' machines was to diminish the loss the defendants would have sustained had they continued to use the machines furnished by the plaintiffs for the term of their commercial life, and that, therefore, the plaintiffs were liable to defendants' damages for breach of the contract were considerpay the cost of the Parsons machines, as including such cost the ably less than they would otherwise have been. The Divisional Court (Lord Alverstone, C.J., and Hamilton, and Avory, JJ.), were of the opinion that inasmuch as the procuring of the new machines had the effect of diminishing the loss the defendants would have sustained had they continued to use those furnished by the plaintiffs, it was a reasonable expense for them to have incurred in discharge of their duty, to minimize the loss; and therefore, the arbitrator was entitled to take the cost of such new machines into account, when fixing the damages, notwithstanding that such machines were also a pecuniary advantage to the defendants, and even if those furnished by the plaintiff had been in accordance with the contract, it would still have been in the plaintiffs' interest to have discarded them in favour of the Parsons machines, though it was conceded that if the putting in the Parsons machines had increased the damages, the cost ought not to be recovered. It was because the substitution was in relief of the plaintiffs that the cost was recoverable. Cf. *Sharpe* v. *White*, 20 O.W.N. 849.

COMPANY—LIST OF MEMBERS—GOVERNMENT RETURN—DEFAULT IN MAKING RETURN—OMISSION TO HOLD ANNUAL MEETING—COMPANIES ACT, 1908 (8 EDW. VII. c. 69) ss. 26, 64 (7 EDW. VII. c. 34, s. 131 (ONT.))—(R.S.C. c. 79, s. 106).

Park v. *Lawson* (1911) 1 K.B. 338. A prosecution for not making a return of the members of a joint stock company, as required by statute 8 Edw. VII. c. 69. (see 7 Edw. VII. c. 34, s. 131 (O.)). The defendants, the directors of the company, set up as an excuse, that no general annual meeting of the company had been held, but a Divisional Court (Lord Alverstone, C.J., and Hamilton and Avory, JJ.), on a case stated by the justices, held that this was no defence.

SEAMAN—DESERTION IN AUSTRALIAN PORT—PROHIBITED IMMIGRANT—FINE IMPOSED ON MASTER—EXPENSE CAUSED BY ABSENCE DUE TO DESERTION—DEDUCTION OF FINE FROM SEAMAN'S WAGES—MERCHANT SHIPPING ACT, 1906, (6 EDW. VII. c. 48) s. 28.

Halliday v. *Taffs* (1911) 1 K.B. 594 is incidentally an instance of the paternal care exercised over a British seaman. The defendant was the superintendent of the mercantile marine office, who had refused to allow a deduction from a seaman's wages in the following circumstances. The seaman in question was a Chinaman on board a ship of which the plaintiff was master. The ship touched at an Australian port, where the Chinaman deserted, and the master was thereupon fined £100 under an Australian Act prohibiting the immigration of Chinese. The plaintiff claimed to deduct the fine and also the expense of a cable message to the owners, from the wages due to the Chinaman, as being an expense caused to the master by the absence of the seaman, due to desertion, within s. 28 of the Merchants Shipping Act, 1906, but a Divisional Court (Lord Alverstone, C.J., Hamilton, and Avory JJ.) held that neither the fine nor the expense of the cable message were expenses within the meaning of the section, and were therefore not deductible from the wages.

JUSTICES—SUMMARY JURISDICTION—ELECTION TO BE TRIED SUMMARILY—EVIDENCE GIVEN BY DEFENDANT — COMMITTAL FOR TRIAL.

The King v. *Justices of Hertfordshire* (1911) 1 K.B. 612. In this case a person accused of larceny elected to be tried sum-

marily before justices. The hearing was proceeded with, and defendant gave evidence in his own behalf, the justices omitting to caution him, and his witnesses also were heard; whereupon the justices came to the conclusion that the case ought not to be summarily dealt with, and committed the accused for trial at the sessions. The Court of Quarter Sessions considered that their jurisdiction was ousted by what had taken place before the justices; but a Divisional Court (Lord Alverstone, C.J., and Pickford and Avory, JJ.) held that it was not, and granted a mandamus, as asked.

SHPPING—DEVIATION—PUTTING INTO PORT OF REFUGE—UNSEAWORTHINESS—LIEN FOR DEAD FREIGHT—DAMAGES.

In *Kish* v. *Taylor* (1911) 1 K.B. 625, the Court of Appeal (Cozens-Hardy M.R., and Moulton and Farwell, L.JJ.) have been unable to agree with the decision of Walton, J. (1910) 2 K.B. 309 (noted ante, vol. 46, p. 612). The action was brought by shipowners to recover for dead freight and to enforce a lien therefor on the cargo. The vessel, through the plaintiff's default, put to sea in an unseaworthy condition, and by reason thereof had to put into a port of refuge. Walton, J., held this did not constitute a deviation and that the defendants and cargo were accordingly liable but the Court of Appeal was of the opinion that the putting into the port of refuge having been necessitated by the plaintiff's negligence in sending the vessel to sea in an unseaworthy condition, it amounted to a deviation and debarred the plaintiffs of their right under the bill of lading to a lien for dead freight, and the plaintiff's action was accordingly dismissed.

EXECUTION—INTERPLEADER—SHERIFF'S COSTS OF INTERPLEADER.

In re Rogers (1911) 1 K.B. 641. The Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.) held that the sheriff's costs of interpleader proceedings are not "costs of the execution" and have therefore reversed the decision of Phillimore, J., (1911) 1 K.B. 104 (noted ante, p. 138).

CRIMINAL LAW—INCEST—EVIDENCE.

The King v. *Hall* (1911) A.C. 47. The defendants in this case were brother and sister, and were indicted for having had carnal knowledge of each other during stated periods in 1910. Evidence was given on behalf of the prosecution that they had been seen

together at night in the same house, which had only one bedroom, and that in the bedroom was a double bed which bore signs of having been occupied by two persons. The witnesses were not cross-examined. The prosecutor then tendered evidence of the previous relations existing between the accused, which was objected to but admitted. This evidence was to the effect that the male defendant took a house in 1907, to which he brought the female defendant as his wife; that they lived there as husband and wife for about sixteen months; that at the end of March, 1908, the female defendant gave birth to a child, and that she registered the birth declaring herself to be the mother and the male defendant the father. The defendants having been convicted the Court of Criminal Appeal quashed the conviction on the ground that the evidence objected to was not admissible in chief, and that nothing had occurred in the conduct of the defence to render it admissible in rebuttal. The House of Lords (Lord Loreburn, L.C., and Lords Halsbury, Alverstone and Gorrell) reversed this decision, and held that the evidence objected to was properly admitted for the purpose of shewing that the accused had a guilty passion towards each other, and to rebut the defence of innocent association as brother and sister. Their Lordships besides confirming the conviction, also ordered the issue of a warrant to arrest the female defendant, who had been discharged from custody pending the appeal.

4 EDW. VII. c. 34 (Q.)—CONSTRUCTION—EXTRA PROVINCIAL CORPORATION—"CARRYING ON BUSINESS IN QUEBEC"—CANADIAN TRADE MARK & DESIGN ACT, 1879—DESCRIPTIVE WORDS—"STANDARD."

Standard Ideal Co. v. *Standard Sanitary Manufacturing Co.* (1911) A.C. 78. This was an appeal from the King's Bench of Quebec. Two points were involved. The Provincial Act, 4 Edw. VII. c. 34, provides that no extra provincial corporation shall carry on business in Quebec unless a license is obtained under the Act. The plaintiffs in the action were an extra provincial corporation, its headquarters being in Pittsburg; it employed an agent as traveller to take orders in the Province of Quebec and then consigned goods direct to the customers, who paid direct to the plaintiffs. The action was brought to restrain the defendants from infringing an alleged trade mark of the plaintiff, and the defendants set up that the plaintiffs were not entitled to the protection of Canadian laws because they were carrying on business in Quebec without a license. The judge at the trial held that

whatever effect the absence of a license might have on the plaintiffs' right to recover for sales made in the province without license, it did not take away the plaintiffs' civil rights, and the plaintiffs were entitled to prevent the violation of those rights. The King's Bench held that the Act did not prevent the plaintiffs from selling outside of the province to persons in the province or from having agents to take orders for the sale and shipment of their wares from the United States into the Province of Quebec, and that they were not evading the Act. The Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson, Shaw and Mersey) were also of the opinion that the plaintiffs were not carrying on business in contravention of the Act. On the main point, however, their Lordships disagreed with the courts below, who had held that the word "standard" had acquired a secondary meeting as applied to the plaintiffs' goods, and that it was the proper subject of a trade mark; whereas their Lordships held that the word being a common English word having reference to the character and quality of the goods in connection with which it is used, and having no reference to anything else, is not an apt or proper word to distinguish the goods of one trader from those of another, and therefore cannot be a valid trade mark. The appeal was therefore allowed and the action dismissed.

BRITISH COLUMBIA LEGISLATURE—JURISDICTION—LANDS IN RAILWAY BELT VESTED IN DOMINION.

Burrard Power Co. v. *The King* (1911) A.C. 87. In this case certain lands in what is called the Railway Belt were vested by the Provincial Legislature in the Dominion for railway purposes; and thereafter the Provincial Legislature had by statute appointed Water Commissioners, who by virtue of the statute had made a grant to the appellants of certain water privileges which the appellants claimed extended to lands in the Railway Belt. The Supreme Court of Canada held that the grant was invalid and conveyed no interest, and the Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson, Shaw and Mersey) affirmed the decision on the ground that the Dominion Government had control of the lands in the Railway Belt, and that the grant under which the appellants claimed properly construed did not, and did not purport to, affect such lands.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] GOODISON THRESHER CO. *v.* MCNAB. [Dec. 23, 1910.

Ontario Municipal Act—Construction—Bridges—Crossing by engines—Condition precedent.

R.S.O. (1897) 242 as amended by 3 Edw. VII. c. 7, s. 43 and 4 Edw. VII. c. 10, s. 60, provides as follows:—

10. (1) Before it shall be lawful to run such engines over any highway whereon no tolls are levied, it shall be the duty of the person or persons proposing to run the same to strengthen, at his or their own expense, all bridges and culverts to be crossed by such engines, and to keep the same in repair so long as the highway is so used.

(2) The costs of such repairs shall be borne by the owners of different engines in proportion to the number of engines run over such bridges or culverts. R.S.O. 1887, c. 200, s. 10.

(3) The two preceding sub-sections shall not apply to engines used for threshing purposes or for machinery in construction of roadways of less than eight tons in weight. Provided, however, that before crossing any such bridge or culvert it shall be the duty of the person or persons proposing to run any engine or machinery mentioned in any of the sub-sections of this section to lay down on such bridge or culvert planks of such sufficient width and thickness as may be necessary to fully protect the flooring or surface of such bridge or culvert from any injury that might otherwise result thereto from the contact of the wheels of such engine or machinery; and in default thereof the person in charge and his employer, if any, shall be liable to the municipality for all damage resulting to the flooring or surface of such bridge or culvert as aforesaid. 3 Edw. VII. c. 7, s. 43; 4 Edw. VII. c. 10, s. 60.

Held, affirming the judgment of the Court of Appeal (19 O.L.R. 188), FITZPATRICK, C.J., and GIROUARD, J., dissenting, that the strengthening of a bridge or laying of planks over it is a condition precedent to the right to run an engine over the same and any engine crossing without observing such condition is unlawfully on the bridge and liable for injury resulting therefrom.

Held, also, FITZPATRICK, C.J., and GIROUARD, J., dissenting, that planks required by sub-sec. 3 over a bridge or culvert were not intended merely to protect the surface from injury by reason of inequalities in the wheels of the engine or machinery passing over it, but was also to guard against the danger of the flooring giving way. Appeal dismissed with costs.

Robinette, K.C., and *J. M. Godfrey,* for appellant. *W. White,* K.C., and *Douglas,* K.C., for respondent.

(Owing to the illness of a judge this case could not be reported earlier.)

Ont.] GARLAND *v.* O'REILLY. [Feb. 21.

Donatio inter vivos—Ante-nuptial contract—Gift to wife—Payment at death of husband—Institution contractuelle—Onerous gift.

An ante-nuptial contract provided that "in the future view of the said intended marriage he, the said Edward O'Reilly, for and in consideration of the love and affection and esteem which he hath for and beareth to the said Miss Eliza Petrie, hath given, granted and confirmed and by these presents doth give, grant and confirm unto the said Miss Eliza Petrie, accepting thereof . . . the sum of twenty-five thousand dollars, currency of Canada, payable unto the said Miss Eliza Petrie by the heirs, executors, administrators or assigns of him the said Edward O'Reilly, the payment whereof shall become due and demandable after the death of him the said Edward O'Reilly." The parties were married and on the death of the said O'Reilly his wife claimed the right to rank on his estate as a creditor for the said sum of $25,000 which claim was contested by the general body of creditors who had all become such after said contract was made.

Held, affirming the judgment of the Court of Appeal (21 O.L.R. 201), that this clause in the contract must be construed as a donatio inter vivos creating a present debt in favour of the future wife, payment of which was deferred; that such a contract could not be attacked by subsequent creditors; and that the wife was entitled to rank on the estate for the amount of said gift.

Held, per GIROUARD, J., that the donation was one à titre onereux. Appeal dismissed with costs.

Casgrain, K.C., for appellants. *Lafleur,* K.C., and *Chrysler,* K.C., for respondents.

Railway Board.] [March 24.

HALIFAX BOARD OF TRADE *v.* GRAND TRUNK RLY. CO.

Appeal—Leave—Jurisdiction of Railway Board—Doubt as to decision of Board.

A judge of the Supreme Court of Canada will not grant leave to appeal from the decision of the Board of Railway Commissioners on a question of jurisdiction if he has no doubt that such decision was correct. Leave refused.

Code, K.C., for motion. . *Biggar*, K.C., contra.

N.S.] REDDY *v.* STROPPLE. [April 3.

Deed—Description—Ambiguity—Admissions.

In an action for trespass to land both parties claimed title from the same and the dispute was as to which title included the locus. The deed under which S. claimed contained the following as part of the description: "then running in an eastwardly direction along the said highway until it comes to a crossway in the public highway and running in a southerly direction until it comes to the waters of Broad Cove." There were two crossways in the highway and S. contended that the first one reached on the course was indicated and R. that it was the second lying a little farther south.

Held, reversing the judgment of the Supreme Court of Nova Scotia, 44 N.S. Rep. 332, ante, vol. 46, 343, IDINGTON and DUFF, JJ., dissenting, that to run the course to the first crossway would take it over land not owned by the grantor; that there were other difficulties in the way of taking that course; that S. apparently for many years treated the second crossway as the boundary; and what evidence there was favoured that view; the construction should be that the crossway mentioned in the description was the second of the two. Appeal allowed with costs.

Newcombe, K.C., for appellant. *Gregory*, K.C., for respondent.

Province of Ontario.

HIGH COURT OF JUSTICE.

Divisional Court.] [March 16.

BOYD *v.* CITY OF TORONTO.

Easement—Lateral support—Withdrawal by operations in street adjoining plaintiff's land—Subsidence—Injury to buildings—Right to support independent of prescription—Compensation—Appreciable disturbance—Absence of negligence.

Appeal by the defendants from the judgment of RIDDELL, J., upon the findings of a jury, in favour of the plaintiff, for the recovery of $600 damages and costs. The action was for damages for the injury caused to the plaintiff's land and house by the operations of the defendants, the city corporation, in digging a trunk sewer in Wyatt avenue, without taking proper precautions for shoring up the sides, whereby a subsidence of the plaintiff's land fronting on Wyatt avenue resulted and the walls of his house were cracked, etc.

BOYD, C.:—For the law in this case (in view of the doubt raised by *Smith* v. *Thackerah* (1866), L.R. 1 C.P. 564), I would be content to rest on the authority of Page Wood, V.-C., in *Hunt* v. *Peake* (1860), Johns. 705. He holds that a land-owner has a right, independent of prescription, to the lateral support of the neighbouring land owned by another so far as that is necessary to uphold the soil in its natural state as its normal level, and also to compensation for damage caused either to the land or to buildings upon the land by the withdrawal of support. . . .

The unsatisfactory character of the case of *Smith* v. *Thackerah*, as reported, is incisively discussed in Banks, pp. 36-38, and the view of Bowen, L.J., in *Mitchell* v. *Darley Main Colliery Co.*, 14 Q.B.D., at p. 137, is quoted. Bowen, L.J., is evidently of the opinion that the true view is, that, if a substantial or appreciable subsidence can be proved, the plaintiff is entitled to nominal damages, quite apart from the amount of actual damages; and that, I think, is the correct result, as manifested by the general trend of the cases, with the sole exception of *Smith* v. *Thackerah*.

Here the plaintiff's scheme was disturbed and changed to a visible, appreciable, and substantial extent by cracks and subsi-

dence by the withdrawal of lateral support resulting from the trenching operations in the street. It does not matter as to the sort of soil which was found below, the removal of which caused the disturbance in the plaintiff's land. It was not necessary to prove negligence in the methods of work adopted by the defendants; the work must be done so as not to disturb the soil of the frontagers. No objection was made to the Judge's charge or as to the questions submitted to the jury. It would be a proper course in cases if this kind to ask the jury whether buildings added to the weight of the land requiring lateral support, and whether the same subsidence would have occurred if the land had been without the buildings.

D. C. Ross, for the defendants. *A. C. McMaster,* for the plaintiff.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] [Feb. 17.

LES SOEURS DE LA CHARITE *v.* FORREST.

Costs—Taxation of—Action—Counterclaim—King's Bench Act.

For the purpose of the taxation of costs, a counterclaim was, before the amendment of sub-sec. (*c*) of s. 2 of King's Bench Act, by s. 17 of c. 12 of 7 & 8 Edw. VII. providing that the word "action" should include suit, set-off and counterclaim, always treated as a cross-action: *Emerson* v. *Guerin,* 12 P.R. 799, and that amendment has made no change in this respect, but was passed to make it clear that the new rule limiting the amount of costs that might be taxed, introduced by s. 1 of the same statute, should apply to set-offs and counterclaims as well as to actions. The plaintiffs, therefore, who became entitled to the costs of their action and of the defendant's counterclaim, were not limited to $300 (outside of disbursements) on both bills, but only on each separately.

Blackwood and *A. Bernier,* for plaintiffs. *Deacon,* for defendant.

Prendergast, J.] [Feb. 20.

WINNIPEG ELECTRIC RY. CO. *v.* WINNIPEG.

Municipality—By-law—Winnipeg charter—Regulations as to poles and wires in the streets claimed to be ultra vires, unreasonable and oppressive—Remedy when by-law conflicts with charter powers of incorporated company.

As the city of Winnipeg, by ss. 714, 720, 721 and 722 of its charter, has possession and control of its streets and lanes and the responsibility of keeping them in proper repair and free from obstructions that might be dangerous and, by sub-s. 123 of s. 703, is authorized to pass by-laws for regulating the erection and maintenance within the city of telegraph or telephone poles or wires and electric light and power poles and wires and to order such poles to be removed and such wires to be placed underground or otherwise, a by-law of the city providing that no person, firm or corporation shall erect or maintain any electric pole or wire without first making an application (in a form prescribed) for a permit and until such permit shall be granted; that every such permit shall be subject to revocation by the city at any time in the absence of an agreement to the contrary ratified by by-law; that there shall be no claim for compensation of any kind by any person, firm or corporation with respect to any rights or privileges alleged to have been acquired under such permit; that any right, leave or license given by such permit shall cease and determine upon such revocation; that upon the revocation of any such permit, the person, firm or corporation to whom it has been issued shall remove all poles and wires erected or maintained under its authority within fourteen days after notice, and authorizing and directing the proper officers of the city to cut down and remove any such poles or wires in the event of such person, firm or corporation refusing or neglecting to remove same after having been duly notified of the revocation of the permit covering the same, not being expressly made retroactive in any way, is neither ultra vires, unreasonable nor oppressive.

2. A provision in the by-law that the acceptance of the permit shall constitute an agreement to be bound by the conditions upon which it was issued, and by the terms of all present and future by-laws of the city relating thereto, does not place any company in a worse position than it would otherwise be, for all such by-laws would have to be ultra vires of the city and the company would be bound by them in any event.

3. The remedy of the plaintiffs, if they could establish that the by-law conflicts with special privileges conferred on them by certain legislation and the agreements authorized thereby, would be to resist the invasion of their rights by injunction or otherwise, but not by motion to quash the by-law in question which must stand, if it is authorized by the charter of the city.

Anderson, K.C., for plaintiffs. *Hunt*, for defendants.

Metcalfe, J.] CUPERMAN *v.* ASHDOWN. [Feb. 26.

Practice—Particulars—Action against owner of a motor vehicle for killing a person—Negligence—Motor Vehicle Act.

Plaintiff sued as administrator of S. The statement of claim set out that the defendant's servants, while driving a motor vehicle belonging to him along a public highway, operated the motor vehicle so negligently that S., who was then riding a bicycle on said street, was struck by the motor vehicle and instantly killed. The defendant's application for an order for particulars was dismissed by the referee. The plaintiff swore that he had no personal knowledge of the manner in which S. came to his death, and that he had no means of obtaining the knowledge necessary to give the particulars asked for.

Held, on appeal from the referee, that, taking into consideration the nature of the action, that some particulars were given in the statement of claim, and in view of the effect of s. 38 of 7 & 8 Edw. VII. c. 34, particulars should not be ordered.

Miller v. *Westbourne*, 13 M.R. 199; and *Brown* v. *Great Western Ry. Co.*, 26 L.T. 398, followed.

Cohen, for plaintiff. *Montague*, for defendant.

Mathers, C.J.] IN RE MONTGOMERY. [March 3.

Administration—Corroboration of evidence of claimant against estate of deceased—Voluntary payments by husband for wife—Liability of husband for wife's funeral expenses.

Held, 1. Although there is no rule of law that requires the evidence of a claimant upon the estate of a deceased person to be corroborated, yet it is a rule of prudence for the protection of the estate from unfounded claims; and when the Master, in taking the accounts of the husband as administrator of the

estate of his deceased wife, disallowed the husband's claim to certain lands that stood in her name for want of corroboration, his finding should not be disturbed. *Finch* v. *Finch*, 23 Ch. D. 271, and *In re Hodgson*, 31 Ch. D. at p. 183, followed.

2. Payments for taxes, registration fees and other expenses connected with the wife's lands made in her lifetime by the husband of his own accord, and without the knowledge of the wife were properly disallowed.

3. A husband cannot recover from his wife's estate money disbursed for the expenses of her funeral unless she has charged them by will upon the estate, or unless there is some statute making such expenses a charge upon her separate estate. *In re Lea*, 1 W.L.R. 460, followed. *In re McMyn*, 33 Ch. D. 575, not followed.

Ferguson, K.C., for plaintiff. *Coyne* and *A. C. Campbell*, for defendants.

Macdonald, J.] [March 7.

SCHULTZ *v.* LYALL MITCHELL CO.

Jury—Workmen's Compensation for Injuries Act—Joinder of another cause of action.

Under s. 59 of the King's Bench Act, a plaintiff suing under the Workmen's Compensation for Injuries Act, has a right to have the action tried by a jury without an order to that effect, and he does not lose that right by adding a claim for damages at common law independently of the Act, though the latter cause of action is one of those in which an order of a Judge for a trial by jury must be obtained.

Macalpine, for plaintiff. *Anderson*, K.C., for defendants.

Mathers, C.J.] LARENCE *v.* LARENCE. [March 21.

Crown patent—Law of descent of land in Manitoba prior to creation of province—Dominion Lands Act—Meaning of word "province" in Dominion legislation—Construction of statutes—Error or oversight in.

By an amendment to the Dominion Lands Act, 60 & 61 Vict. c. 29, it is enacted as follows: "Where patents for any lands have been or are hereafter issued to a person who died or who hereafter dies before the date of such patent, the patent in such case shall not therefore be void, but the title to the land designated therein and granted or intended to be granted thereby shall become

vested in the heirs, assigns, devisees or other legal representatives of such deceased person according to the laws of the province in which the land is situate, as if the patent had issued to the deceased person during life." The plaintiff claimed title to the lots in question, now part of the city of St. Boniface, under a patent from the Crown issued in 1906 in the name of Charles Larence, his grandfather, who died in February, 1870, before the creation of the Province of Manitoba. The patent recited the above Act and also contained the following recitals: "And whereas the legal representatives (within the meaning of the above enactment) of the late Charles Larence etc., are entitled to a grant of said lands, and application has been made by or on behalf of them or some of them for such patent." "And whereas, having in view the provisions of the above enactment, we deem it expedient for good and sufficient reasons to issue such grant to or in the name of the said late Charles Larence," and the habendum was "To have and to hold the same unto the said Charles Larence his heirs and assigns forever."

Held, that, as the lands in question were not in any province at the date of the death of Charles Larence, the above statute did not cover the case, or avail to validate a patent issued in the name of a deceased person which, without the support of some statute was a nullity and that, as the plaintiff was unable to establish a title to the lands independently of the patent, his action must be dismissed.

Although satisfied that there must have been some error or oversight in drafting a statute, the Court cannot correct the error or supply the omission, for that would be to legislate and not to interpret the Act. *Commissioners of Income Tax* v. *Pemsel* (1891), A.C., per Halsbury, L.C., at p. 543, and *In re Sepulchre's*, 33 L.J. Chy. p. 375 followed.

Coyne and *A. C. Campbell*, for plaintiff. *Laird, Jameson* and *Nason*, for defendants.

Mathers, C.J.] [March 21.

IN RE BYERLEY AND CITY OF WINNIPEG.

Expropriation of land by municipality—Assessment by arbitrators of value of land taken—Value at time of making award or at date of by-law to expropriate—Winnipeg Charter, ss. 823-826.

Under s. 825 of the Winnipeg Charter, 1 & 2 Edw. VII. c. 77, when the city has passed a by-law for the expropriation of

land for any purpose of the city, but the land has not been entered upon or used by the city, it is not bound by any award the arbitrators may make as to the value of the land proposed to be taken unless the award is, within three months thereafter, adopted by another by-law; but, if the city exercises its power of entering upon or using the land before the making of the award, it would be bound to carry out the purchase.

Held, that, in the former case, the arbitrators should assess the value of the land as at the time of making the award and not as at the date of the by-law, if values have changed in the meantime. *Pretty* v. *Toronto*, 19 A.R. 503, distinguished.

Order referring the matter back to the arbitrators to assess the value as at the date of their previous award.

Wilson, K.C., and *A. M. S. Ross*, for applicant. *T. A. Hunt*, for City of Winnipeg.

Macdonald, J.] [March 21.

NEWTON *v.* FOLEY BROS., LARSON CO.

Assignment f.b.o.c.—Money paid to sheriff by assignor before assignment—Priority as between assignee and execution creditor—Assignments Act.

Held, 1. Moneys paid to the sheriff by an execution debtor whose goods have been seized under the execution, but have not been sold thereunder, are the property of the execution creditor, and the sheriff is not required by s. 9 of the Assignments Act R.S.M. 1902, c. 8, to pay them over to the assignee under an assignment by the execution debtor for the benefit of his creditors, unless such moneys are the proceeds of an actual sale by the sheriff.

2. The words "completely executed by payment" in s. 8 of the Act, giving precedence to an assignment for the general benefit of creditors over all executions not completely executed by payment, mean executed by payment to the sheriff, not to the execution creditor, so that the assignee has no right, under that section, to any moneys collected by sheriff under an execution against the assignor.

Clarkson v. *Severs*, 17 O.R. 592, followed.

Richards and *Kemp*, for plaintiff. *F. M. Burbidge*, for defendants.

Robson, J.] [Feb. 21.

SAWYER & MASSEY CO. *v.* FERGUSON.

Contract—Implied warranty—Fitness of machinery—Waiver —Sale of Goods Act—Notice.

The defendant by agreement in writing dated 21st August, 1909, agreed to buy from the plaintiffs a threshing machine and other articles for $1,065 and to pay for same in two instalments, $535 on 1st November, 1909, and $530 and interest on 1st November, 1910. Shortly after the date of the contract, certain threshing machinery was delivered to defendant in presumed compliance with the contract. Defendant paid the first instalment and gave his note for the other instalment, but claimed at the trial that he had done so under protest, because the machinery was not satisfactory; and he defended this action for the amount of the note alleging breach of the warranty or condition that the machine would do as good work as any of the same size sold in Canada and that he had given the notices required by the terms of the agreement. The agreement contained the same provisions as are set out fully in the head note to *Sawyer & Massey Co.* v. *Ritchie*, 43 S.C.R. 614. The defendant sought at the trial, though not pleaded, to invoke the aid of section 16 of the Sale of Goods Act, R.S.M. 1902, c. 152, on the subject of implied conditions or warranties.

Held, following *Sawyer & Massey Co.* v. *Ritchie*, that the clauses of the agreement excluded the provisions of the Sale of Goods Act as to implied conditions, and that the purchasers' remedies for breach of warranty as to the working capacity of the machinery entirely depended on his having observed the terms of the warranty, so that if the defendant neglected to observe them, both his defence to the claim on the note and his counterclaim for damages for breach of the warranty would fail.

The notices relied on by defendant were as follows: He complained over the telephone to the plaintiffs' local agent, Menzies, who sent to plaintiffs at Winnipeg a telegram reading thus, "Send Badgley, J. M. Ferguson separator laid up." Badgley was an expert in such machinery employed by plaintiffs.

Held, that, as the alleged notice contained no information as to wherein the machinery failed to satisfy the warranty, it was not a sufficient notice to comply with the contract and that there was nothing from which to infer a waiver as in *American Abell* v. *Scott*, 6 W.L.R. 550.

Held, also, that the provision in the contract excluding a waiver would apply in this case.

Fullerton, for plaintiffs. *E. B. Fisher* and *Eakins,* for defendants.

Robson, J.] BANK OF MONTREAL *v.* TUDHOPE. [March 3.

Bank Act, R.S.C. 1906—*Sale of goods by pledgor in ordinary course of business—Assignment of chose in action—Set-off.*

Held, 1. Goods purchased from the wholesale manufacturer thereof in the ordinary course of business without notice that he has given security thereon to a bank under ss. 86 to 88 of the Bank Act, R.S.C. 1906, c. 29, will become the property of the purchaser free from any claim of the bank under such security. *National Mercantile Bank* v. *Hampson,* 5 Q.B.D. 177, followed.

2. The defendants were entitled to set off their claim for goods sold to the Sylvester Company as against the claim of the plaintiffs upon an assignment to them by the Sylvester Company of their claim for goods sold to the defendants to the extent of such set-off as it stood at the time of receiving notice of the assignment, since there was clear evidence of an agreement that there should be such a set-off.

Sifton v. *Coldwell,* 11 M.R. 653, *Story,* ss. 1434, 1435, and *Lundy* v. *McCulla,* 11 Gr. 368, followed. *Watson* v. *Midwales Ry. Co.,* 36 L.J.C.P. 285, distinguished.

Kilgour, for plaintiff. *Dennistoun,* K.C., and *Stacpoole,* for defendants.

Prendergast, J.] [March 22.

IN RE WOOD AND CITY OF WINNIPEG.

Municipal law—By-law—Motion to quash for unreasonableness and discrimination—Prohibition as to erection of buildings within fixed distance from street line in residential locality—Removal of prohibition in favour of individual owner—Status of applicant—Acquiescence—Winnipeg charter.

Under par. 29 of s. 703 of the Winnipeg charter, the city passed a by-law prohibiting the erection of buildings on River Avenue, a residential street, within 15 feet of the street line. Subsequently a by-law was passed in amendment of the former law and permitting one Millman to erect a building on the

corner of River Avenue and an intersecting business street within six feet of the street line on condition that he would convey the six feet and a small triangle at the corner to the city. On motion to quash the amending by-law,

Held, that it was not justified by any considerations of public interest or benefit and was unreasonable and discriminatory and should have been quashed if moved against at the proper time by an applicant whose status was unobjectionable. *In re Pellot and Township of Dover*, 10 W.R. 792; *Hamilton Distillery Co.* v. *City of Hamilton*, 12 O.L.R. 75, *and Attorney-General of Canada* v. *City of Toronto*, 25 S.C.R. 514, followed. *In re Inglis and City of Toronto*, 9 O.L.R. 562, distinguished.

Held, however, that the motion must be denied, because it had not been made until about ten months after the date of the by-law attacked, during which time Millman had erected and completed his building at a cost of $80,000.00, and the applicant had been fully cognizant of the work from its inception. *In re Tabor and Township of Scarborough*, 20 U.C.R. 549; *In re Grant and Township of Puslinch*, 27 U.C.R. 154, and *In Re Platt and City of Toronto*, 33 U.C.R. 53, followed.

Whitla and *Chandler*, for applicant. *T. A. Hunt* and *Auld*, for City of Winnipeg.

RULES OF COURT.

Appeals to Privy Council.

The following announcement respecting appeal books has been sent to us for publication:—

As a result of correspondence between the Registrar of the Privy Council and the Registrar of the Court of Appeal the latter has been advised by the former that he is "prepared to accept appeal books printed in the form suggested, without marginal notes, but with headlines."

The form suggested by the Registrar of the Court of Appeal was "with headlines" instead of with marginal notes. The practice in Ontario has been to insert appropriate headlines, though the rules are silent as to such. Hereafter the practice should be observed in all cases. The Registrar of the Supreme Court having already stated appeal books printed in accordance with Rule 1305 will be accepted by him, and now the Registrar of the Privy Council having expressed a like readiness, provided "headlines" are inserted, all differences are practically removed, and the one set of appeal books, therefore, will suffice, and a substantial saving in the cost of printing be assured.

Canada Law Journal.

VOL. XLVII. TORONTO, MAY 1. No. 9.

DAMAGES FOR BREACH OF CONTRACT FOR NON-DELIVERY OR NON-ACCEPTANCE OF SHARES.

In two recent cases in Ontario, the question has arisen as to the proper measure of damages for breach of a contract to take or deliver shares, and in both of these cases the conclusion arrived at appears to have been unsatisfactory from a legal point of view, and based on what we cannot help regarding as erroneous principles. In the first of these cases, *Sharpe* v. *White*, 2 O.W.N. 849, the action was by the vendor against the vendee for breach of a contract for the sale of shares. It would appear from the statement of facts in the note of the judgment, that the plaintiff contended that the damages should be assessed at the difference of the price agreed to be paid at the date of the breach, and the price the shares were then worth; but that the defendant claimed that the shares had subsequently appreciated in value and that such subsequent appreciation must be taken into account in estimating the plaintiff's damages. The referee refused to give effect to this contention, and Clute, J., affirmed his decision. With great respect to the learned judge we venture to think both he and the referee proceeded on an erroneous principle. The object of the action was to compensate the plaintiff for the loss he had sustained by reason of the defendant's default in carrying out the contract, but if and when those damages come to be ascertained it was found that the plaintiff had actually sustained none, but had in fact made a gain by reason of the defendant's default; it seems to offend against common sense and law and justice to suppose that he could in that event recover more than nominal damages. An action for breach of contract of this kind must be amenable to the same principles as govern other actions, and if it can be demonstrated at any time up to the assessment of damages that no loss has been actually sustained, nothing but nominal damages ought to be recoverable.

The case of *Oldershaw* v. *Holt*, 12 Ad. & E. 590, is instructive on this point. That was an action for breach of a contract contained in an agreement for a building lease for 99 years. The rent was to be £115 a year and the lessee contracted to build houses, and in default that the plaintiff might re-enter. Before the expiration of 5 years he made default and the plaintiff re-entered and subsequently re-let the premises for the residue of the former tenant's term at a peppercorn for the first year, £70 for the second, and £140 for the rest of the term. The plaintiff claimed the difference between the rent he was to have received from the defendant and the rent he was to receive for the first two years under the second lease. It was admitted that the new lease would ultimately be more advantageous than the first if the tenant continued solvent and fulfilled his engagement. The jury in these circumstances gave a verdict for the defendant, and the court refused a new trial, holding that the jury might properly take into account in estimating the damages the increased rent secured under the second lease. In the recent case of the *British Westinghouse Co.* v. *Underground Ry.* (1911) 1 K.B. 575, the Court of Appeal held that it is the duty of a contracting party to minimize the damages he sustains by reason of a breach of a contract, and that he may recover an outlay which he incurs for the purpose of diminishing, and which in effect does diminish the damages.

The principle on which both these cases proceed is that the actual loss is what is recoverable and that if the plaintiff does, as a matter of fact, save himself from loss he cannot recover substantial damages from the defendant. This principle was recognized and acted upon by the Judicial Committee of the Privy Council in *Erie County Natural Gas Co.* v. *Carroll* (1911) A.C. 105.

Clute, J., quotes the following passage from Halsbury's Laws of England: "In an action for the non-delivery of shares the measure of damages is the difference between the contract price and the market price at the date of the breach."

In the case before the court, however, the action was not for non-delivery, but for non-acceptance, which is a vitally different

situation. The proposition quoted is based on the theory that the purchaser can on that day go into the market and buy shares, and the difference between the price he would then have to pay and the price he has contracted to pay forms the measure of damages. But when the vendor retains his shares and ultimately sells them at a profit, to say that he can still recover substantial damages for breach of a contract to sell them at a less price is certainly against reason and common sense, and we also venture to think unsupportable in law.

The other case to which we referred is that of *Goodall* v. *Clarke*, 23 O.L.R. 57, which was an action for breach of contract for delivery of shares, to which the proposition above quoted would apply, but in that case there was the difficulty that the shares had no recognized market value. They were mining shares of fluctuating and uncertain and speculative value. An injunction had been obtained pendente lite to restrain the defendant from parting with the shares in question, which had been subsequently dissolved, on consent, to enable the defendant to carry out a sale of them at 26c. a share. A sale had been made in exceptional circumstances about the time of the breach at 40c. and the referee had fixed the damages on that basis. Meredith, C.J., on appeal from his report, fixed them on the basis of 26c. per share, the price at which they had been actually sold, a Divisional Court fixed them on a basis of 33½c. on some sort of indiscoverable rule of thumb, and the Court of Appeal affirmed that decision, Meredith, J.A., dissenting; the reasoning of Mr. Justice Meredith seems unanswerable and to carry conviction. While there was reasonable ground for fixing the value of the shares at 26c. there appears to have been no evidence at all for fixing it at 32½c., there being no evidence whatever of any sale at that figure, and though, as Mr. Justice Meredith points out, the onus was on the plaintiff of proving the damage he had sustained, yet the Divisional Court and the Court of Appeal seem to have come to the conclusion that the court was at liberty to guess at the damages, and to determine them on some sort of conjecture and not on the evidence adduced. If we had a receptacle for "bad law" we are inclined to the opinion that both of these cases would be fitting subjects for such a depository.

SIR ELZEAR TASCHEREAU.

The death of Sir Henri Elzear Taschereau, which took place at his home in Ottawa on the 14th of April, has removed from amongst us a man who, in his day, was eminent at the Bar, on the Bench and in public affairs; in private life esteemed and respected by all who knew him. Born in 1836 at Ste. Marie de la Beauce, in the Province of Quebec, he died at the age of 75, full of years and of well-earned honours.

Sir Elzear was educated at the Seminary of Quebec. He studied law, was called to the Bar in 1857, and practised in the city of Quebec, being at one time partner of the late Mr. Justice Blanchet. He was appointed K.C. in 1867, and in the following year was appointed clerk of the District of Quebec. In 1861 he was elected to Parliament for the County of Beauce, was re-elected in 1863, but defeated in 1867, which was the end of his political career. While in Parliament he was a supporter of Macdonald and Cartier, and of the measures which led to the Confederation of Canada.

In 1878, at the age of thirty-five, he was appointed a puisne judge of the Superior Court of the Province of Quebec. In 1873 he was transferred from the Ditsrict of Quebec to that of Kamouraska, his residence being at Riviere du Loup, a place where for many years he made his home for the summer months. In the year 1878 he was appointed a judge of the Supreme Court of Canada, of which he became Chief Justice in 1902, being knighted the same year. In 1906 he retired from the Bench and spent the remaining years of his life in study and the management of his private affairs.

Sir Elzear came by descent Seigneur of Ste. Marie de la Beauce, which had been ceded to his great grandfather in 1746. Always a student he devoted his leisure hours to the advancement of learning in relation to his profession and was the author of several works of great value to its members, besides frequent contributions to journals in connection with it. He wrote and published in the year 1874, "The Criminal Law of Canada, with Notes, Commentaries, Precedents and Indictments, etc.," con-

sisting of two volumes, and also "The Code de Procedure Civile du Bas Canada, with Annotations." Other publications were the "Criminal Code of the Dominion of Canada as amended in 1893, with Commentaries, etc.," and "Notes Genealoqique sur la Famille Taschereau," in the year 1896. He received the degree of LL.D. from Laval University in the year 1890. Besides his connection with Laval he was also interested in the University of Ottawa, and succeeded Sir John Thompson as Dean of the Faculty of Law in that institution.

As Chief Justice of the Supreme Court Sir E. Taschereau was appointed to act as administrator of the Government in the interval between the departure of Lord Minto and the arrival of Earl Grey, and at the same time was made a member of the Privy Council. He attended several sittings of the Judicial Committee of that body, and, before his illness took a fatal turn, was thinking of going again to England to attend the Coronation.

The ability of the late Chief Justice as a jurist, and his great qualities as a judge, are so well known to the profession that no comment upon them is needed at our hands. To few men in this country has it been given to fill so many distinguished positions, and to discharge duties of such importance; and few men are so gifted as to be able to do so much with credit to themselves and benefit to their country.

In private life the deceased was always found a broad-minded, well-informed and courteous gentleman, of irreproachable character, strict in the discharge of the duties connected with his religion, and of all those which pertained to the high position which he so honourably occupied.

PROFESSIONAL MEN FOR LEGAL OFFICES.

We have been compelled on various occasions to criticize, sometimes adversely, the legislative action of the Government of the Province of Ontario. It is pleasant, therefore, to give credit when credit is possible. It had been the practice of previous governments to appoint men to offices of a quasi legal and quasi judicial character who had no qualifications for such

positions a practice which did not and could not be expected to give good results. We have called attention to the absurdity of appointing a farmer to the position of a County Court clerk; it is difficult also to imagine what qualifications an auctioneer could have for the position of a registrar of deeds, or a baker to perform the duties of a Surrogate Court clerk. We might enlarge on these incongruities indefinitely, but these samples are sufficient. Why were these offices not filled by professional men who could enter upon the discharge of their duties with a full knowledge of their duties, and who could, therefore, give better service than could possibly be given by laymen necessarily ignorant of such duties?

We are glad to see that the present government of Ontario has entered upon a new departure in these matters. Two lawyers have in succession been appointed to the position of Registrar in the city of Toronto. Another professional man, Mr. G. F. Harman, is now clerk of the Surrogate Court of the County of York, taking the place of the deceased baker. No one could have been appointed to this office who would be more acceptable to the profession than Mr. Harman, as he is thoroughly familiar with the duties of the position, as well as being both painstaking and courteous. The same may be said as to the appointment of Mr. R. H. Bowes as Registrar for West Toronto. We trust that all other provincial governments will see the propriety of filling positions of the nature referred to from the ranks of the profession. Not only are lawyers entitled to it, but it is for the benefit of the public that they should fill such positions. The trouble is the profession does not assert itself in matters of this kind or look after their own interests as other classes do.

THE PREROGATIVES OF THE CROWN AND THE PRIVILEGES OF THE PEOPLE.

Two episodes within a few days of each other, the one in the House of Lords on the 30th ult., and the other in the House of Commons on the 6th inst., illustrate very forcibly the trend of constitutional development by which the prerogatives of the Crown have become virtually the privileges of the people. In

the House of Lords, Lord Lansdowne moved an address to the King praying that His Majesty would be graciously pleased to consent to a bill being introduced limiting the prerogatives and powers of the Crown in so far as they relate to the creation of peerages and the issue of writs of summons to Lords Temporal and Spiritual to sit and vote in the House of Lords. The King's consent, in accordance with well-established Parliamentary practice, must be given at some stage of their progress in the House in which they are introduced to bills which concern the Royal prerogative, and must be formally communicated to that House by a Privy Councillor. Viscount Morely, on behalf of the Government, intimated that the Cabinet would offer their advice to the Sovereign to consent to the prayer of the address moved by the noble marquis. When it is remembered that the Cabinet are responsible to the House of Commons, and through the House of Commons to the people, for advice offered to the Sovereign, and that the Sovereign will act on that advice or dismiss the advisers, it is demonstrably clear that, in the exercise by the Crown of the Royal prerogatives on such advice, in reality the exercise of the Royal prerogatives is in accordance with the wants and wishes of the people, to whom ultimately the Cabinet are responsible. In the discussion on the Archer Shee case in the House of Commons on the 6th inst., the action of the Crown in raising a demurrer to the claim, which if eventually successful would have been a barrier to the hearing of the case and the deciding of it on the facts, was thus justified by Mr. McKenna, the First Lord of the Admiralty: "Now I come to the question of the demurrer. There are certain rights and prerogatives which we speak of as the prerogatives of the Crown. In these days the prerogatives of the Crown are not exercised for the benefit of the Crown, but for the benefit of the public. These prerogatives are in existence, and any Minister in charge of his office is a trustee for the maintenance of these prerogatives. I should not have been doing my duty if as long as Parliament leaves these powers in my hand I did not exercise them." The Attorney-General, whose intervention in debate was strictly con-

fined to explanation and the removal of misunderstandings, thus spoke of the raising of the demurrer as a barrier to the hearing of the action and the disclosure of the evidence on which the action was based:—

"Being an officer, the boy could not go to a court of justice in respect of his dismissal. It was for him as a law officer not to make the law, but to administer the law as he found it, and the books were full of the judgments of the courts declaring that there was no such right of action. The late Lord Esher, when Master of the Rolls, said it was quite impossible for the court to discuss questions of this kind, and added that not even the Queen herself could alter that. In order that there should be no misapprehension, it should be pointed out that, when the rights of the Crown were spoken of, the meaning was the rights of the public, and it has been held that it was in the interests of the community, on the ground of public policy, that there should be no right of action in the courts in such cases. . . . Was it the view of the honourable and learned member (Mr. Cave, K.C.) that it would be the duty of the law officers to say that they were content to have such actions tried? This was one of the matters in which a law officer had no right to waive the privileges of the Crown, which were the rights of the public."

The doctrine thus so emphatically laid down, that the prerogatives of the Crown are the privileges of the people, would before the Revolution of 1688 have been regarded as a travesty of our whole constitutional system. In a collusive action brought by his servant against Sir Edward Hales, a Roman Catholic, to recover the penalty of £500 imposed by the Test Act for accepting the commission of a colonel of a regiment without the previous qualification of receiving the Sacrament in the Church of England, from which he had been dispensed by the King in the exercise of his Royal prerogative, eleven judges out of the twelve held that the prerogative of the King could be exercised in his own interest and at his own discretion quite irrespective of the interest of the public. The Chief Justice (Herbert) laid it down that the Kings of England were sovereign princes, but

the laws of England were the King's laws, and that it was consequently an inseparable prerogative of the Crown to dispense with penal laws in particular cases. There was no law, he said, which might not be dispensed with by the supreme law-giver: (State Trials, XI., pp. 1165-1280). The unadvised assertion of this principle made, in the words of Mr. Hallam, "the co-existence of an hereditary line claiming a sovereign prerogative paramount to the liberties they had vouchsafed to concede incompatible with the security and probable duration of these liberties. This incompatibility is the true basis of the Revolution of 1688": (Hallam's Constitutional History, III., p. 63).

The Revolution of 1688, although it substituted a statutory King for a monarch who claimed to reign by an indefeasible right and to possess prerogatives paramount to the liberties and privileges of his people, did not immediately convert the Royal prerogatives into privileges of the people. Mr. Hallam, writing in 1818, takes a far different view from Sir Rufus Isaacs of the prerogatives of the Crown nearly a century and a half after the Revolution.

"The word 'prerogative,'" he writes, "is of a peculiar import and scarcely understood by those who come from the studies of political philosophy. We cannot define it by any theory of executive functions. All these may be comprehended in it, but also a great deal more. It is best, perhaps, understood by its derivation, and has been said to be that law in the case of the King, which is law in no case of the subject. . . . It is said, commonly enough, that all prerogatives are given for the subjects' good. I must confess that no part of this assertion corresponds with my view of the subject. It neither appears to me that these prerogatives were ever given nor that they necessarily redound to the subjects' good. Prerogative, in its old sense, might be defined as an advantage obtained by the Crown over the subject in cases where their interests came into competition by reason of its greater strength. They sprang from the nature of the Norman government, which rather resembled a scramble of wild beasts, where the strongest takes the best share, than a system

founded on principles of common utility. And modified as the exercise of most prerogatives has been by the more liberal tone which now pervades our course of government, whoever attends to the common practice of courts of justice, and, still more, whoever consults the law books, will not only be astonished at their extent and multiplicity, but very frequently at their injustice and severity'': (Hallam's Middle Ages, III., p. 148).

Professor Dicey, writing in 1885, presents a far different estimate of the effect of the prerogatives of the Crown which have been by the practice of the Constitution in its modern development, as stated without fear of contradiction in the House of Commons and as impliedly acknowledged and accepted in the House of Lords, been virtually transferred to the Cabinet, who are themselves the servants of the people.

"The survival," writes Professor Dicey, "of the prerogative, conferring, as it does, wide discretionary authority upon the Cabinet, involves a consequence which constantly escapes attention. It increases the authority of the House of Commons, and ultimately of the constituencies by which that House is returned. Ministers must in the exercise of all discretionary powers inevitably obey the predominant authority in the State. When the King was the chief member of the sovereign body, Ministers were in fact no less than in name the King's servants. At periods of our history when the peers were the most influential body in the country, the conduct of the Ministry represented with more or less fidelity the wishes of the peerage. Now that the House of Commons has become by far the most important part of the sovereign body, the Ministry in all matters of discretion carry out, or tend to carry out, the will of the House. When, however, the Cabinet cannot act except by means of legislation, other considerations came into play. . . . While every action which is done by virtue of the prerogative is in fact, though not in name, under the direct control of the representative Chamber, all powers which can be exercised only in virtue of a statute are still more or less controlled in their exercise by the interference of the courts. One example taken from the history of recent

years illustrates the practical effect of this difference. In 1872 the Ministry of the day carried a bill through the House of Commons abolishing the system of purchase in the army. The bill was rejected by the Lords. The Cabinet then discovered that purchase could be abolished by Royal Warrant—*i.e.*, by something very like the exercise of the prerogative. The system was then and there abolished. The change, it will probably be conceded, met with the approval, not only of the Commons, but of the electors. But it will also be conceded that, had the alteration required statutory authority, the system of purchase might have continued in force up to the present day. The existence of the prerogative enabled the Ministry in this particular case to give immediate effect to the wishes of the electors, and this is the result which under the circumstances of modern politics the survival of the prerogative will in every case produce. The prerogatives of the Crown have become the privileges of the people'': (Law of the Constitution, pp. 392-394).

The example cited by Mr. Lecky of the exercise of the prerogative of the Crown by the Cabinet as a privilege of the people is peculiarly significant if we remember that the fiercest contest between Charles I. and the Parliament was in reference to the control of the army. The prerogative, however, which was claimed by Charles I. for a personal purpose, has been exercised in our own times by Ministers of the Crown in the interests of the people, whose servants they acknowledge themselves to be. The Royal prerogative debate in the House of Lords and the Archer Shee debate in the House of Commons, as illustrations of this great development of our Constitution, are of supreme value.—*Law Times.*

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

PROBATE—ADMINISTRATION—"SPECIAL CIRCUMSTANCES"—PROBATE ACT, 1857 (20-21 VICT. C. 77), S. 73—(10 EDW. VII. C. 31, S. 54(2) (ONT.))—HUSBAND AND WIFE—MURDER OF WIFE BY HUSBAND—HUSBAND'S EXECUTOR APPLYING FOR ADMINISTRATION OF WIFE'S ESTATE—GRANT TO NEXT OF KIN OF WIFE—EVIDENCE.

Re Crippen (1911) P. 108. This was an application by one of the next of kin of the murdered wife of the notorious Dr. Crippen for administration to her estate. The application was opposed by Ethel Le Neve, whom the doctor had appointed his sole legatee and executrix. It was contended on her behalf that the conviction of the deceased doctor of the murder of his wife was res inter alios acta and not admissible evidence of the commission of the crime in the present proceeding, and that by his death he had expiated his crime, and that his personal representative was entitled to the grant, but Evans, P.P.D., rejected this claim, and made the grant as asked on the ground that the facts presented "special circumstances" within the meaning of the Probate Act, 1857, s. 73 (10 Edw. VII. c. 31, s. 54(2) (Ont.)), justifying his passing over the husband's representative, and he comes to the conclusion that the alterations in the laws of evidence have practically destroyed the basis on which some of the older cases rested, in which it was held that a record of a conviction was inadmissible evidence of the commission of the crime, in other proceedings in which the fact had to be proved.

SOLICITOR—AGREEMENT FOR SERVICE—RESTRICTIVE UNDERTAKING—CARRYING ON BUSINESS OF A SOLICITOR—CONSTRUCTION—LETTER WRITTEN OUTSIDE TO PERSON WITHIN PROHIBITED AREA—INJUNCTION.

Woodbridge v. *Bellamy* (1911) 1 Ch. 326 was an action by solicitors against a solicitor to enforce an undertaking not to carry on the business of a solicitor within a specified area. The breach complained of was the writing of a letter by the defendant in his character of a solicitor from London, where he carried on business to a person resident within the prescribed area demanding payment of a debt on behalf of a client residing also within

the prohibited area. The recipient of the letter who was not in fact the debtor, as a result of the correspondence which ensued, purchased the debt, and for his services to both parties in the matter the defendant received payment. Eve, J., thought this was a carrying on business within the prescribed area contrary to the agreement and granted an interim injunction, but the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.) held that it was not, and dissolved the injunction. Buckley, L.J., remarks that, according to the construction Eve, J., put on the agreement, if a solicitor in London wrote to Toronto to demand payment of a debt, he would be carrying on business at Toronto which he thought an extravagant and absurd proposition.

COMPANY—DIRECTORS—QUALIFICATION SHARES HELD BY DIRECTORS IN TRUST FOR PROMOTERS—MISFEASANCE—DAMAGE.

In re London & South Western Canal (1911) 1 Ch. 346. This was an application in a winding-up proceeding to make certain directors of the company liable in respect of their qualification shares for which they had paid no consideration, and which some held as a gift from, and others as, trustees for, the promoter. By the English Companies Act the first directors of a company appear to be bound to acquire their qualification shares by purchase from the company, and Eady, J., held that their acquisition from the promoter, either as a gift from, or in trust for him, was a misfeasance on the part of the directors, for which they were liable to the company for the value of the shares which would have been received by the company, had the shares been acquired from it; and as it appeared that some shares had been sold at par, each director was held liable for the full amount of his qualification shares at their par value.

WILL—GIFT TO COLLATERALS—DEATH OF DONEE BEFORE TESTATOR—ATTEMPT TO INCLUDE REPRESENTATIVES OF DONEE PREDECEASING TESTATOR LEAVING ISSUE—WILLS ACT, 1837 (1 VICT. C. 26), S. 33—(10 EDW. VII. C. 57, S. 37 (ONT.)).

In re Gresley, Willoughly v. *Drummond* (1911) 1 Ch. 358. A testatrix, in the exercise of a general testamentary power, appointed a trust fund to a class of collaterals who should be living at the period of distribution, and attempted to include in the class the issue of members of the class who should predecease her

leaving issue, using words similar to those contained in the Wills Act, s. 33 (10 Edw. VII. c. 57, s. 37 (Ont.)), but Eady, J., held that the provisions of that section only apply to gifts to issue of a testator, and are inapplicable to gifts to collateral relatives.

CONTRACT—COVENANT BY COVENANTOR WITH HIMSELF AND OTHERS —JOINT CONTRACT—LEASE—ASSIGNEE—COVENANT RUNNING WITH LAND.

Napier v. *Williams* (1911) 1 Ch. 361. This was an action brought by lessors against the assignee of a lease to obtain a declaration that the assignees were bound by certain covenants in the lease, and held the premises subject thereto. The premises formed part of the estate of a testator who by his will authorized his trustees to lease them to his son Carlton Roberts, if he desired, the lease to contain covenants to repair and other usual covenants. Carlton Roberts elected to take a lease which was accordingly made for 21 years to Carlton Roberts, his executors, administrators and assigns, he himself being one of the trustees, and he thereby covenanted with himself and his co-trustees to repair, etc. He entered into possession, and carried on business for a certain number of years, when he assigned the lease to a company. The company issued debentures secured by a trust deed, which included the lease, and the action was against the debenture trustees. The defendants had never been in possession, and contended that the covenantor being himself one of the covenantees, the covenants in the lease were void and were, therefore, not binding on the defendants. Warrington, J., held that there was no ground for rectification of the lease so as to make the covenant joint and several, or for holding that the defendants were to be deemed tenants from year to year, because the lease was not void in law; but the covenants being by one person with himself and others jointly (following *Ellis* v. *Kerr* (1910) 1 Ch. 529, noted ante, vol. 46, p. 420, were void; consequently there was no covenant which could run with the land and impose any personal liability on the defendants. The action, therefore, failed.

COPYRIGHT—PHOTOGRAPHS—SUPPLY FOR ILLUSTRATING MAGAZINE —PUBLICATION AFTER TERMINATION OF AGREEMENT—INJUNCTION—FINE ARTS COPYRIGHT ACT, 1862 (25-26 VICT. C. 68), SS. 1. 4, 6, 11.

Bowden v. *Amalgamated Pictorials* (1911) 1 Ch. 386. In this case the plaintiffs were proprietors of photographs, some of which

were copyrighted and some not. They from time to time furnished the defendants, the proprietors of weekly journals, with photographs for reproduction in such journals at certain charges for each user. While the defendants had some of the plaintiffs' photographs still in their hands, the plaintiffs' terminated the agreement, but the defendants continued to publish the copyright photographs and also those not copyrighted. This action was brought to restrain them from so doing. The defendants claimed that under the agreement they had the right to retain the photographs supplied by the plaintiff and use them as, and when, they desired, paying the stipulated charges; but Parker, J., held that the plaintiffs had a right to put an end to the agreement, and thereafter the defendants' right to reproduce the photographs ceased; and that the plaintiffs were entitled to an injunction to restrain the defendants infringing the plaintiffs' copyright and also their common law rights in the photographs for which they had not registered copyrights.

NUISANCE—POLLUTION OF RIVER—DISCHARGE OF SEWAGE INTO RIVER—RIPARIAN OWNER—INJUNCTION—RIGHT OF PRIVATE PERSON TO RESTRAIN NUISANCE.

Jones v. *Llanrwst District Council* (1911) 1 Ch. 393. In this case the plaintiff, a riparian proprietor, brought an action to restrain the defendant, a municipal body, from discharging sewage into the stream as being a nuisance and injury to his riparian rights. The action was resisted on the ground that the plaintiff was not the owner of any part of the bed of the stream, and that the plaintiff being only a reversioner could not maintain the action, whether for trespass or nuisance, without joining the tenant in possession; but Parker, J., held that none of these objections could prevail and that the plaintiff as a riparian proprietor in reversion had a right to have the water of the stream flow past his land in a natural state of purity, and was entitled to the injunction claimed, and that a private individual is entitled to restrain a municipal authority from allowing sewage to escape from its sewer to his injury.

COVENANT—MORTGAGE BY PARTNERS OF REAL ESTATE—DEATHS OF PARTNERS—RELEASE BY TRUSTEES OF ONE PARTNER TO TRUSTEES OF THE OTHER PARTNER—COVENANT BY TRUSTEES TO INDEMNIFY RELEASOR AGAINST MORTGAGE—LIMITATION OF LIABILITY UNDER COVENANT.

Watling v. *Lewis* (1911) 1 Ch. 414. In this case, two partners

having died entitled to partnership real estate subject to a mortgage, the trustee of one partner released to the trustees of the other partner the interest of the releasor in the equity of redemption in this property, and the releasees covenanted with the releasor "as such trustees, but not so as to create any personal liability on the part of them or either of them" to indemnify the releasor against all claim under the mortgage. The mortgagees having sold the mortgaged property for less than sufficient to satisfy the mortgage debt, demanded payment of the deficiency from the releasor, who paid it, and brought the present action to recover it from his covenantors, who contended that by reason of the restrictive words of the covenant they were not personally liable under the covenant; but Warrington, J., held that the attempted restriction of liability was nugatory, as the effect of the words if valid, would be not merely to limit but destroy the covenant altogether, and inasmuch as there was a covenant to pay and indemnify, the proviso was repugnant and of no effect.

COMPANY—MISFEASANCE OF DIRECTORS—DIRECTORS' GROSS NEGLIGENCE—MISSTATEMENT IN PROSPECTUS—CLAUSE EXEMPTING DIRECTORS FROM LIABILITY—NEGLIGENCE.

In re Brazilian Rubber Plantations (1911) 1 Ch. 425. This was a winding up proceeding in which it was sought to make certain directors liable for alleged misfeasance. The company was formed for the purpose of purchasing certain estates in Brazil, and for that purpose entering into with, or without, modification, a specified contract with a syndicate. On the day of incorporation the directors issued a prospectus inviting subscriptions for shares, which contained statements as to the area of the estate and number of rubber trees, which was untrue. These statements were taken from a report furnished to the directors by the member of a firm who had obtained an option to purchase the estate, and had sold it to the syndicate at an increased price. The report was fraudulent, but the directors believed it to be true, and adopted it without inquiry. Subsequently, before the whole of the purchase money was paid the directors received information from an agent that the statements contained in the report and prospectus were untrue, that instead of there being 12,500 acres there were only 2,000, and instead of there being 400,000 trees there were only 50,000, but the agent did not advise a cancellation of the contract, but led them to suppose that notwithstanding the untrue statements the property was

"satisfactory," and they, therefore, went on and completed the contract. The articles contained a provision that no director should be liable for any loss or damage occasioned by any error of judgment or oversight on his part or for any other loss or damage which should happen in the exercise of his office unless the same happened through his own dishonesty. In these circumstances Neville, J., held that the directors had not been guilty of such gross negligence as to make themselves liable for misfeasance, and that even if they had been guilty of gross negligence, without personal dishonesty, the provision of the articles relieved them from liability therefor.

MARRIAGE SETTLEMENT — CONSTRUCTION — COVENANT TO SETTLE AFTER-ACQUIRED PROPERTY — "BECOME ENTITLED TO ANY ESTATE OR INTEREST"—ASSIGNMENT OF EVEN DATE BY WIFE—ULTIMATE TRUST FOR WIFE—CONTINGENT INTEREST—VESTING IN POSSESSION DURING COVERTURE.

In re Williams, Williams v. *Williams* (1911) 1 Ch. 441. The plaintiff, a lady, being entitled absolutely to one-third of a fund and also contingently to the remaining two-thirds in the event of her two brothers dying under 21 without issue, or to one-third if only one of them should so die, in 1909 in contemplation of her marriage by deed assigned, inter alia, her one-third share of certain mortgage debts constituting part of the fund and "all other, if any, her share or interest in the said mortgage debts," to trustees upon trust after the marriage to raise out of the securities transferred £12,000, and subject thereto to stand possessed of the property assigned in trust for the assignor absolutely. By her marriage settlement of even date the £12,000 was settled upon the usual trusts of a wife's fund, and the plaintiff covenanted with the trustees of the settlement, that if she should at any time during the intended coverture become "entitled in any manner and for any estate or interest" to any real or personal estate exceeding £500 in value she would convey the same to the trustees of the settlement for the trusts of the wife's fund. After the marriage a brother of the plaintiff died whereby she became absolutely entitled to his third share of the fund, and the question was raised as to what the rights of the parties were under the deed and settlement. Eve, J., held that the plaintiff's interest in the shares of her two brothers was in 1909 a contingent and not a vested interest; and that this contingent interest in the mortgages assigned to trustees passed to them under the deed of

1909, and that subject to the raising of the £12,000 for the purposes of the marriage settlement, the moneys representing such share were payable to the plaintiff unaffected by her covenant, which he held must be read and construed in the light of the trusts created by the assignment of even date and not so as to defeat those trusts. And he further held that the plaintiff's share in the fund (other than the mortgage debts assigned) which fell into possession on the brother's death was caught by the covenant in the settlement whereby the plaintiff bound herself to settle after-acquired property.

DISTRESS DAMAGE FEASANT—IMPOUNDING DISTRESS—POUND MORE THAN 3 MILES DISTANT—1 & 2 P. & M. c. 12, s. 1—(R.S.O. c. 342, s. 14).

Coaker v. *Willcocks* (1911) 1 K.B. 649 may be briefly noted for that a Divisional Court (Darling and Bucknill, JJ.) decided that when a distress is made of animals damage feasant, the statute 1 & 2 P. & M. c. 12, s. 1 (R.S.O. c. 342, s. 4), which provides that no distress of cattle shall be driven out of the hundred, etc., except it be to a pound overt within the shire not above three miles distant from the place the distress is taken, does not preclude the distrainor from driving the distress to a pound within the hundred, etc., although it be more than three miles from the place where the distress was taken.

LANDLORD AND TENANT—LEASE—EXECUTED CONTRACT—INNOCENT MISREPRESENTATION—RESCISSION—JURISDICTION—"VALUE OF PROPERTY"—COUNTY COURTS ACT, 1888 (51-51 VICT. c. 43), s. 67—(10 EDW. VII. c. 30, s. 32 (1)(*c*), (*e*), (*i*), ONT.).

In *Angel* v. *Jay* (1911) 1 K.B. 666 the action was brought in a County Court to rescind a lease on the ground of misrepresentation. Neither the lessee's nor the lessor's interests in the property exceeded in value £500, but the value of the freehold did exceed £500. The misrepresentation complained of was that the drains were in order, when in fact they were not, the misrepresentation was made innocently and without any intention to defraud or deceive. The County Court judge granted the relief prayed; but the Divisional Court (Darling and Bucknill, JJ.) overruled his decision on two grounds; first, that the contract being executed, the court had no equitable jurisdiction to rescind it, as the misrepresentation did not amount to fraud: and second, because the jurisdiction of the County Court was

limited in such cases to "where the value of the property shall not exceed the sum of £500"; and in the judgment of the Divisional Court those words did not mean the value of the interests of the litigants in dispute, but meant the whole value of the land in question.

CRIMINAL LAW—LARCENY—EVIDENCE OF ASPORTAVIT.

The King v. *Taylor* (1911) 1 K.B. 674. In this case the defendant was indicted for larceny, and it was proved by the prosecutor, that the accused had put his hand into the prosecutor's pocket, seized his purse and drew it to the edge of the pocket, but failed to draw it completely out of the pocket owing to its meeting an obstruction. The prosecutor grasped the purse and replaced it, and the question was whether this was sufficient evidence of an asportation of the purse to warrant the conviction of the accused. The Court of Criminal Appeal (Darling, Pickford and Bankes, JJ.) held that it was.

ORDER FOR PAYMENT OF COSTS OF MOTION TO COMMIT—ACTION TO RECOVER COSTS PAYABLE UNDER ORDER—CRIMINAL PROCEEDING.

In *Seldon* v. *Wilde* (1911) 1 K.B. 701, which was an action to enforce payment of costs payable under an order made on a motion to commit the defendant, a solicitor, for disobedience of an order of the Court, the defendant applied to stay the action on the ground that it was an abuse of the process of the court, and also on the ground that the order sued on was made in a criminal or quasi-criminal proceeding, and that therefore no action could be brought on the order. The majority of the Court of Appeal (Buckley and Kennedy, L.JJ) held that these objections were not entitled to prevail, but Williams, L.J., dissented, and considered the order was made in the exercise of a quasi-criminal jurisdiction over the defendant as an officer of the court, and therefore was not enforceable by civil action.

ARBITRATION—CONTRACT WITH MUNICIPALITY—DISPUTES TO BE REFERRED TO MUNICIPAL ENGINEER—ACTION BY CONTRACTOR STAYING PROCEEDINGS—ATTACK ON CONDUCT OF ARBITRATOR—DISCRETION OF COURT—ARBITRATION ACT, 1889 (52-53 VICT. C. 49), S. 4—(9 EDW. VII. C. 35, S. 8, ONT.).

Freeman v. *Chester* (1911) 1 K.B. 783. The plaintiffs sued on a contract made with the defendants, a municipal body, for

the price of certain works constructed for the defendants. By the terms of the contract disputes were to be referred to the municipal engineer. The defendants moved to stay proceedings under the Arbitration Act, 1889, s. 4 (9 Edw. VII. c. 35, s. 8, Ont.), and the plaintiffs resisted the motion on the ground that the engineer had by his conduct disqualified himself from being arbitrator. In these circumstances the Master refused the application, and his order was affirmed by Lush, J., and the Court of Appeal (Cozens-Hardy, M.R., and Buckley, L.J.) dismissed an appeal from Lush, J., although neither of the members of the court was satisfied that it had been satisfactorily shewn that the engineer was really disqualified from acting impartially, but in the exercise of the discretion conferred by the Act, they refused to interfere with the order of Lush, J.

COMPANY—DEBENTURES—APPOINTMENT OF RECEIVER BY DEBENTURE HOLDERS—REMUNERATION OF RECEIVER, BY WHOM PAYABLE—RECEIVER, AGENT OF DEBENTURE HOLDERS.

Deyes v. *Wood* (1911) 1 K.B. 806 was an action brought by a receiver against the debenture holders of a company by whom he had been appointed receiver, to recover remuneration for his services as receiver. The debentures were issued by a limited company and were a charge on its undertaking and expressly provided that the holders might, with the consent in writing of the holders of a majority in value of the outstanding debentures, appoint a receiver, and that the receiver so appointed should have power to take possession and receive all property charged by the debentures. Under this provision the plaintiff was appointed and acted as receiver. The debentures did not provide that the receiver so to be appointed was to be the agent of the company, and it was held by Scrutton, J., that he was the agent of the debenture holders, and that they, and not the company, were liable for his remuneration, and this decision was affirmed by the Court of Appeal (Williams, Farwell, and Kennedy, L.JJ.).

LIMITATION OF ACTION—COMPENSATION UNDER LAND CLAUSES ACT—AWARD—ACTION—WHEN STATUTE BEGINS TO RUN.

Turner v. *Midland Ry.* (1911) 1 K.B. 832. By certain works which the defendants were by statute authorized to construct and which were constructed in 1903, the plaintiff's lands were injuriously affected. No claim for compensation was made by

the plaintiff until 1909; the defendants refused to pay, and the matter went to arbitration and the arbitrator awarded £10 8s. as compensation and costs £79 18s. The action was brought on the award and the defendants set up that the plaintiff's claim was barred by the Statute of Limitations. But a Divisional Court (Ridley and Avory, JJ.) held that the Statute of Limitations did not begin to run until the making of the award, as, up to that time, the plaintiff had no cause of action.

SOLICITOR—REGISTRAR OF COUNTY COURT—DEFENDANT IN PERSON OFFICER OF COURT—REGISTRAR DEFENDANT IN HIS OWN COURT —TAXATION BY REGISTRAR OF HIS OWN COSTS.

In *Tolputt* v. *Mole* (1911) 1 K.B. 836, the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.) have affirmed the judgment of the Divisional Court (1911) 1 K.B. 87 (noted ante, p. 137), both in regard to the taxation by the defendant of his own costs; and also as to the propriety of the items allowed.

NEGOTIABLE INSTRUMENT—PROMISSORY NOTE—DURESS—KNOWLEDGE OF DURESS BY HOLDER—EVIDENCE—BURDEN OF PROOF—BILLS OF EXCHANGE ACT, 1882 (45-46 VICT. C. 61), S. 30, S.-S. 2—(R.S.C. C. 119, S. 58(2)).

Talbot v. *Von Boris* (1911) 1 K.B. 854. This was an action against husband and wife on two promissory notes to which the wife's signature had been obtained by duress. It was not proved that the plaintiff had notice of the duress, and the wife, who was called as a witness, said that she did not think the plaintiff knew of it. The plaintiff was not called as a witness, and gave no evidence to negative his knowledge of the duress. The jury found that the signature of the wife had been obtained by duress, but that the plaintiff did not know of the duress. On these findings Phillimore, J., gave judgment for the plaintiff, and the Court of Appeal (Williams, Farwell and Kennedy, L.JJ.) held that he was right, and that the onus was on the defendant to shew that the plaintiff had knowledge of the duress; and that the provisions of the Bills of Exchange Act, s. 30, sub-s. 2 (R.S.C. c. 119, s. 58(2)), do not apply to the original payee of a negotiable instrument, but only to subsequent holders.

REPORTS AND NOTES OF CASES.

England.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Right Hons. Lords Macnaghten, Atkinson, Collins, and Shaw.] [March 18.

WERTHEIM *v.* CHICOUTIMI PULP COMPANY.

Sale of goods—Breach of contract to deliver—Damages.

This was an appeal from the Court of King's Bench for the Province of Quebec.

The rule that the measure of damages for delay in delivering goods in accordance with a contract is the difference between the market price at the time when the goods ought to have been delivered, and the price at the time when they were in fact delivered is intended to place the party complaining, so far as it can be done by money, in the position in which he would have been if the contract had been duly performed. Therefore where the purchaser of goods, which had not been delivered at the time fixed by the contract, had resold them before delivery at a price very little below the market price at the time when they ought to have been delivered, and considerably above the market price at the time when they were in fact delivered,

Held, that he was only entitled to recover as damages the difference between the market price at the time of the breach and the price for which the goods were actually sold.

Where a contract provided for the delivery of goods at a place where there was no market for them,

Held, that damages for non-delivery should be calculated with reference to the market at which the purchaser, to the knowledge of the vendor, intended to sell them, less cost of carriage.

Judgment of the court below affirmed with a variation.

Sir Robert Finlay, K.C., and *G. G. Stuart* (of the Quebec Bar), for appellant (plaintiff). *Atkin*, K.C., *L. Taschereau* (of the Quebec Bar), and *T. Matthew*, for respondents (defendants).

Dominion of Canada.

SUPREME COURT.

B.C.] ALLEN *v.* THE KING. [March 31.

Criminal law—Conviction for murder—Trial—Evidence improperly admitted—Substantial wrong to prisoner—New trial—Criminal Code, s. 1019.

Sec. 1019 of the Criminal Code provides that a convicted prisoner shall not be granted a new trial for improper admission of evidence or some illegal proceeding at the trial unless the Court of Appeal is of opinion that "some substantial wrong or miscarriage was thereby occasioned."

Held, Davies and Idington, JJ., dissenting, that in order to obtain a new trial under this provision the prisoner is not required to demonstrate that substantial wrong or miscarriage was in fact occasioned by the evidence improperly admitted or the illegal procedure; it is sufficient if it appears that such wrong or miscarriage might have been occasioned.

Per Davies and Idington, JJ., that if evidence was improperly admitted at the trial in this case, which is doubtful, it could not under the circumstances have affected the verdict.

New trial ordered.

J. A. Ritchie, for appellant. *McKay*, K.C., for respondent.

Ont.] TOMS *v.* TORONTO RY. CO. [April 3.

Damages—Negligence—Physical injuries—Mental shock—Severance of damages.

Plaintiff was riding in a street railway car when it collided with a train. He was thrown over to the back of the seat facing him but was able to leave the car and start to walk to his place of business, but had only proceeded a short distance when he collapsed and had to be taken home in a cab. He was laid up for several weeks and on the trial of an action against the Railway Co. for damages one doctor giving evidence testified that the physical injury he had received was the exciting cause of his condition, while others ascribed it to mental shock. Negligence on the part of the company was not denied, but the trial Judge was asked to direct the jury to separate the damages for the two, but refused. A verdict for plaintiff was upheld by the Court of Appeal.

Held, affirming the judgment appealed against (22 O.L.R. 204) that the trial Judge rightly refused to direct the jury as asked; that the evidence showed the injuries to plaintiff were the direct consequence of the negligence of the company, and that the verdict should stand. Appeal dismissed with costs.

Glyn Osler, for appellants. *Masten,* K.C., for respondent.

Ont.] ROBISON *v.* BUTLER BROS. [April 3.

Negligence—Damages—New trial—Volens.

In the construction of a tunnel under the Detroit River the respondent company had an apparatus for lifting material to the surface, consisting of a crane and cable with hook and buckets hauled up and down through an air shaft by an engine on the surface. At the top of the shaft a "tag man" was stationed to signal the engineer when to start or stop the engine and when to run fast or slow. The officers and men of the respondent company and of the Detroit River Tunnel Co. engaged on the same work were in the habit of coming to the surface through the air shaft and the "tag man" gave a special signal to the engineer when a man was coming up. R., an employee of the Detroit River Co. was attempting to come up on one occasion when the apparatus did not remain in the centre but was swinging around and in a narrow part of the shaft a block on the cable with a hook over which was a ring which R. was grasping, caught in the timbers on the side and the ring came off the hook, throwing him to the bottom of the shaft and causing his death. In an action on behalf of his parents the jury found the respondent company negligent in using an unsafe hook while allowing persons to use this apparatus, and also by the tag man not signalling the engineer to stop until the cable ceased moving. They assessed the damages at $4,000, all for deceased's mother. The verdict was sustained by a Divisional Court, but the Court of Appeal granted a new trial on the ground that the question of volens on the part of R. should be passed upon by the jury.

Held, that as such question had been raised for the first time in the Court of Appeal a new trial should not have been granted on that ground.

The evidence as to damages was that the deceased gave his mother $25 per month regularly and presents in goods or money that would make his whole contribution over $500 a year.

Held, that $4,000 was an excessive sum to give the mother,

and the order for a new trial should stand but be restricted to a proper assessment of the damages.

Sale, for appellant. *Rodd* and *Kenning,* for respondents.

Ont.] CLARKE *v.* GOODALL. [April 3.

Appeal—Nature of action—Action in equity—Judicial proceeding—Declaration of rights—Injunction—Reference—Appeal from referee—Final judgment.

An action was brought claiming a declaration that plaintiff was entitled to receive a certain number of shares of the capital stock of a company and for an injunction to restrain defendant from dealing with his shares until those claimed by plaintiff were transferred to him. On the trial it was held that plaintiff was entitled to damages for breach of contract to deliver him the shares and a reference was ordered to have such damages assessed, further directions and costs being reserved. On appeal to a Judge from the referee's report, the damages were reduced, but were increased on further appeal to a Divisional Court whose judgment was affirmed by the Court of Appeal. On appeal from the judgment of the registrar of the Supreme Court affirming the jurisdiction to entertain an appeal from the Court of Appeal.

Held, 1. The action was one at common law for breach of contract, and that neither the inclusion of the demand for an injunction nor the reservation by the trial Judge of further directions, made it a judicial proceeding in the nature of a suit or proceeding in equity within the meaning of sec. 38 (*c*) of the Supreme Court Act so as to permit of an appeal to the Supreme Court whether the judgment appealed against was final or interlocutory.

2. The judgment of the Court of Appeal, varying the assessment of damages by the referee, was not a final judgment from which an appeal would lie to the Supreme Court.

Appeal from registrar allowed with costs.

Owen Ritchie, for appellant. *G. F. Henderson,* K.C., for respondent.

Exch. Court.] THE KING *v.* WALLBERG. [April 3.

Contract—Public work—Work dehors contract—Acceptance by Crown—Payment—Fair value.

W. was a contractor with the Crown for constructing a car

and locomotive repair plant at Moncton, N.B., and was subject to the orders of the Government engineer. By order of the engineer and with no contract in writing therefor, he constructed sewers and a water system in connection with said works, and on completion of his contract the Crown accepted the additional work and agreed to pay its fair value, but not the amount claimed, which was deemed excessive. The Department of Railways referred the claim to the Exchequer Court and, by consent, it was referred to the Registrar of the Court to have the damages assessed, the order of reference providing that "the amount to be ascertained shall be the fair value or price thereof allowed on a quantum meruit." The registrar fixed the amount at $53,205, as the fair value of the work reasonably executed on a somewhat different plan. The judge of the Exchequer Court added $39,000 to this amount, holding that the Crown had admitted the authority of the engineer to order the work to be done, and that W. was entitled to the actual cost plus a percentage for profit. On appeal by the Crown,

Held, Anglin, J., dissenting, that the judgment appealed against was not warranted; that the Crown had not admitted the authority of the engineer, but expressly denied it by pleadings and otherwise; that all W. was entitled to be paid was the fair value of the work to the Crown, and the amount allowed by the referee substantially represented such value. Appeal allowed with costs.

Tilley and *Friel*, for appellant. *W. Nesbitt*, K.C., and *Harold Fisher*, for respondent.

EXCHEQUER COURT.

Cassels, J.] [Feb. 28.

BROWN, LOVE & AYLMER *v.* THE KING.

Public Work — Trent Canal — Contract — Claims thereunder — Meaning of word "claim"—Waiver—Validity—Reference of questions of quantities and prices.

Held, 1. That the word "claim" as used in s. 38 of the Exchequer Court Act, R.S. 1906, c. 140, must be construed to mean a cause of action.

2. That, upon a construction of s. 48 of the Exchequer Court Act, a waiver by the Crown of stipulations in a contract respecting (*a*) the fixing of rates and prices by the engineer; (*b*)

the limitation of time for the performance of the contract; (*c*) the finality of the engineer's decision of certain matters in controversy between the parties; (*d*) the obtaining of written directions and certificates of the engineer as conditions precedent to recovery for extra work; and (*e*) the formal making and repetition of claims by the contractor, such stipulations constituting technical defences to claims by the contractor might be validly waived by a Minister of the Crown under the authority of an Order-in-Council in that behalf. *Pigott* v. *The King*, 10 Ex. C.R. 248, 38 S.C.R. 501, considered.

3. Upon a reference to the court of a claim by the Minister of Railways and Canals under the provisions of s. 38 of the Exchequer Court Act, in connection with which the above waivers were made, the court held that, under the circumstances, it might be declared that the contractors were entitled to recover in respect of certain items of work, leaving the questions of quantities and prices therefor to be fixed by the engineer to whom by consent of parties such questions were referred.

McLaughlin, for claimants. *Stewart*, for defendant.

Cassels, J.] [March 15.

IN THE MATTER OF THE PETITION OF RIGHT OF JOHNSON *v.* THE KING.

Public work—Injury to the person—Fatal accident to workman—Negligence — Evidence — Statement of witness before the coroner's inquest—Inadmissibility.

On the trial of a petition of right for damages against the Crown, arising out of an accident on a public work, whereby the suppliant's husband was killed, the plaintiff sought to read and put in evidence the statement of a deceased witness who had been sworn and gave evidence before the coroner at the inquest into the death of the suppliant's husband some five years before the trial of the petition. At this inquest the Dominion Government was not represented by counsel, or otherwise, and had no opportunity of cross-examining the witness whose statement was so tendered.

Held, that in the absence of an opportunity on the part of the Dominion Government to cross-examine the witness before the coroner, his evidence was inadmissible. *Sills* v. *Brown*, 9 C. & P. 601, considered and not followed.

The evidence on the whole case shewing that the accident was solely due to the negligence of the deceased in attempting to climb upon a swing-bridge while it was in motion, the petition was dismissed.

Staunton, O'Heir & Morison, for suppliant. *Harcourt* and *Cowper,* for the Crown.

Cassels, J.] MORRIS *v.* THE KING. [April 12.

Customs Act—Reference by Minister of a claim to the court—Affidavit used before Minister in respect of which there was no opportunity of cross-examining the deponent—Admissibility.

By s. 183 of the Customs Act, 51 Vict. c. 14, it is provided that upon a reference of any matter to the court by the Minister of Customs, the court shall hear and consider the same upon the papers and evidence referred, and upon any further evidence produced under the direction of the court. Among the documentary evidence referred in connection with a claim for a refund of duties paid, was an affidavit by a witness, since deceased, testifying to a fact adverse to the claimant, and in respect of which no opportunity was afforded the claimant to cross-examine the deponent.

Held, that while the statements of the deponent were not as effective as if he had been examined as a witness in court, and so subject to cross-examination, yet the affidavit was admissible as evidence under the statute.

Beaudin and *Loranger,* for claimant. *Archambault,* for Crown.

Province of Ontario.

COURT OF APPEAL.

Full Court.] REX *v.* LEE. [March 24.

Criminal law—Gold and Silver Marking Act—Authority of Dominion and of Provincial legislatures—Overlapping of legislation—Ultra vires.

Case stated by one of the judges of the County Court of York, by whom the defendant was convicted of a breach of the Gold and Silver Marking Act, 7-8 Edw. VII. c. 30 (D.).

The learned judge found the defendant guilty of the charge and pursuant to an order of this court stated a case and submitted for its opinion the following question:—

Is sub-s. (*b*) of s. 16 of the said Act ultra vires the Parliament of Canada?

Moss, C.J.:—Sections 16 and 17 of the Act appear under the heading of "Offences and Penalties." They are the culmination of a series of provisions comprising ss. 9, 10, 11, 12, 13, 14, and 15, manifestly designed for the protection of purchasers, intending purchasers, and the public generally, against imposition or deception as to the quality, fineness, grade or description of the articles therein specified. Broadly stated, the means adopted are (1) to render obligatory the application of certain marks, and (2) to prohibit the application of certain other marks to articles of the kind made, sold or brought into Canada by a dealer, the governing purpose being the prevention of the use of false or misleading indicia.

Sec. 16 reads as follows: "Everyone is guilty of an indictable offence who being a dealer within the meaning of this Act—(*a*) contravenes any provision of ss. 9, 10, 11, 12, 13 or 14 of this Act; (*b*) makes use of any written or printed matter or advertisement or applies any mark to any article, of any kind referred to in s. 13 or in s. 14 of this Act, or to any part of such article, guaranteeing or purporting to guarantee by such matter, advertisement or mark that the gold or silver on, or in such part thereof, will wear or last for any specified time." Sec. 17 prescribes the penalties to be imposed in case of conviction.

The objection made to sub-s. (*b*) is that it assumes to render penal what is nothing more than the mere warranting in writing or by means of a mark that lasting quality of the article, a matter of contract or representation, not within the realm of criminal law. But assuming that to be the case, it by no means concludes the matter. It does not follow that there is not resident, either in the Parliament of the Dominion or in the Provincial Legislature, the power to declare such an act an offence and to provide punishment therefor. That the Imperial Parliament possesses the power is beyond question. And it has exercised it on much the same lines as in the Act in question here.

In the division of legislative power between the Parliament of Canada and the Legislature of the Provinces effected by the British North America Act many fields of legislation are left within the competence both of the Parliament and of the Legis-

latures. And, as more than once remarked, in one way of dealing with a particular subject it may be within s. 91, and in another way, or for another purpose, it may fall within s. 92: *Citizens' Insurance Co.* v. *Parsons*, 7 App. Cas. 107, 108; *Hodge* v. *The Queen*, 9 App. Cas. 130, per Osler, J.A., in *Regina* v. *Wason* (1890) 17 A.R. 221, at p. 224.

The exclusive legislative authority conferred by s. 91 upon the Parliament of Canada in relation to the criminal law, including the procedure in criminal matters, does not deprive the Provincial Legislatures of the right to legislate for the better protection of the rights of property by preventing fraud in relation to contracts or dealings in a particular business or trade: *Regina* v. *Wason*, supra. But on the other hand, the right of the Provincial Legislatures to so legislate does not deprive the Parliament of its powers in relation to criminal law.

In this case no question of conflicting legislation arises. And although in one way the sub-section may appear to interfere with the right and power to contract, yet in another way it is the exercise of the power to prevent and punish the adoption of methods whereby the public are, or may be exposed to deception and imposition.

The question should be answered in the negative.

G. Waldron, for the defendant. *E. Bayly*, K.C., for the Crown. *J. Jennings*, for the Minister of Justice.

HIGH COURT OF JUSTICE.

Middleton, J.] MUTRIE *v.* ALEXANDER. [March 11.

Will—Action to establish—Jurisdiction of Surrogate Courts and High Court—Declaratory judgment.

This was an action to establish the will of Andrew Alexander, deceased, and for a declaration that the executor named therein was entitled to probate. The will, it was said, was lost, but the court did not think there was adequate proof of search, but was satisfied that it had been duly executed.

Held, 1. That the High Court has no testamentary jurisdiction except when conferred upon it by the Surrogate Courts Act, 10 Edw. VII. c. 31, ss. 32 and 33, in matters commenced in the Surrogate Court and transferred to the High Court and in

actions to set aside wills in which the jurisdiction is conferred by s. 55 of the Judicature Act; and it has also the power to determine the title to land possessed by the courts of equity and law upon the issue devisavit vel non.

2. As to the additional application for a declaratory decree, the court has no power to pronounce such a decree apart from legislative authority, unless consequent relief is asked and can be given, and the High Court cannot under the guise of a declaratory decree usurp the jurisdiction conferred by legislature upon any other tribunal.

H. Guthrie, K.C., for plaintiff. *F. Denton,* for defendants.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] MANNING *v.* CITY OF WINNIPEG. [April 10.

Municipal corporation—Contract of, without by-law—Employment of counsel by city—Winnipeg charter.

Appeal from judgment of MATHERS, C.J., noted vol. 46, p. 548, dismissed with costs.

Full Court.] SMITH *v.* NATIONAL TRUST CO. [April 10.

Mortgage—Power of sale—Possession of mortgaged premises held by mortgagee for statutory period—Real Property Limitation Act—Real Property Act—Laches—Acquiescence.

Held, 1. A mortgagee under a mortgage of land registered under the Real Property Act, whether the power of sale contained in the mortgage may be exercised without notice or after notice, can only make a valid sale of the property (1) by the directions or order of the district registrar under section 110 of the Act, or (2) by an action in the Court of King's Bench for foreclosure or sale; and, therefore, a purchaser from the mortgagee, although the latter be lawfully in possession and purports to sell and convey the land, does not acquire a title free from the mortgagor's

right to redeem, when such sale is not made under the directions or order of the district registrar or in an action in the court.

2. In such a case section 111 of the Act does not apply so as to make the sale good.

3. Sec. 75 of the Real Property Act, which provides that "after land has been brought under this Act no title thereto adverse or in derogation to the title of the registered owner shall be acquired by any length of possession merely," means the same as if the word "merely" had been omitted, and operates so as to prevent the mortgagee and all persons claiming under him from obtaining, under s. 20 of R.S.M. 1902, c. 100, a declaration of the court that the mortgagor's equity of redemption has been lost, in consequence of adverse possession for more than ten years. *Belize Estate Co.* v. *Quilter* (1897), A.C. 367, distinguished.

4. Neither can such a declaration be obtained, on the ground of the laches and acquiescence of the mortgagor or his representatives, in an action by the purchaser asserting a title in himself and claiming to be registered as the owner of the land, relying only on such a sale as is referred to in above paragraph 1.

Coyne, for plaintiff. *Galt*, K.C., for defendant.

KING'S BENCH.

Mathers, C.J.] ALDOUS *v.* GRUNDY. [March 29.

Principal and agent—Revocation of agency—Claim for work done before revocation—Commission on sale of land—Quantum meruit.

An agent who has been promised a commission on the sale of land, if made within a limited time at a price and on terms stipulated, although he had not an exclusive agency, is entitled to payment quantum meruit for his expenditure of time and money paid for advertising which resulted in his finding within the time limited a purchaser for the property able and willing to carry out the purchase, although the agency was revoked before the proposing purchaser had actually bound himself to buy the property, in a case when the principal, at the time of creating the agency, knew that the agent would, in reliance upon the

terms of his employment, spend time and money in the hope of earning the commission agreed on.

Aldous v. *Swanson*, 20 M.R. 101, followed.

Verdict for half the amount of the commission the plaintiff would have earned if the sale had been carried out.

Galt, K.C., for plaintiffs. *Stacpoole* and *Lorne Elliott*, for defendant.

Mathers, C.J.] LA FLECHE *v.* BERNARDIN. [March 30.

BERNARDIN *v.* LA FLECHE.

Warranty—Fraudulent representations—Action on promissory notes—Counterclaim—Principal and surety—Damages for breach of warranty—Consolidation of cross actions—Set-off of verdicts.

Held, 1. It is no defence to an action on a promissory note that it was given for the price of an article sold by the payee to the maker with a warranty which has been broken, unless the vendor was guilty of a fraudulent or reckless misrepresentation in making the sale; the maker's proper remedy being either to counterclaim or bring a cross action for damages for the breach of warranty.

2. A party who has signed such a note as surety for the maker may, if sued along with the maker, set off against the plaintiff any damages which the maker would be entitled to recover against him for the breach of warranty. *Bechervaise* v. *Lewis*, L.R. 7 C.P. 372, followed.

When the maker of the note brought a cross action for the breach of warranty, instead of counterclaiming in the action brought against him, and recovered a verdict for damages exceeding the amount due on the note, the two actions, having been tried together, were consolidated, one verdict was set off against the other, and final judgment ordered to be entered in the consolidated action in favour of the maker of the note for the difference only. Illustration of the proper assessment of damages for breach of a warranty that a stallion sold was a sixty per cent. foal getter.

Hagel, K.C., and *Cutler*, for La Fleche. *Blackwood* and *Manahan*, for Bernardin. *Hull* and *Sparling*, for sureties on note.

Mathers, C.J.] [April 4.

BANTING *v.* WESTERN ASSURANCE CO.

Railway Act, R.S.C. 1906, *c.* 37, *as amended by* 9 *Edw. VII. c.* 32, *s.* 9—*Loss by fire caused by sparks from locomotive—Right of company to benefit of insurance against same loss—Action by insured against insurer after recovery of judgment against railway company.*

This was an action to recover from an insurance company the amount of a policy against loss by a fire caused by sparks from a railway locomotive. The plaintiff had recovered judgment against the railway company for the amount of his loss under section 298 of the Railway Act, which judgment had been paid less the amount of the policy sued on.

The last paragraph of that section as amended by 9 Edward VII. c. 32, s. 9, is as follows: "Provided further that the company shall, to the extent of the compensation recoverable, be entitled to the benefit of any insurance effected upon the property by the owner thereof. Such insurance shall, if paid before the amount of compensation has been determined, be deducted therefrom; if not so paid, the policy or policies shall be assigned to the company, and the company may maintain an action thereon.

Held, that the statute did not of its own force vest the policy in the railway company, and that, unless it had demanded an assignment, the plaintiff was not bound to give it and might maintain an action against the insurance company upon the policy.

Corporation of Oldham v. *Bank of England* (1904), 2 Ch. at p. 716, distinguished.

Trueman, for plaintiff. *Laird,* for defendant.

Metcalfe, J.] [April 4.

HANNESDOTTIR *v.* RURAL MUNICIPALITY OF BIFROST.

Taxes—Unpatented land—Sale of land after issue of patent for taxes imposed before issue.

Under s. 159 of the Assessment Act, R.S.M. 1902, c. 117, having regard to the special provisions of the Act and more particularly to s. 166, there may be a sale, after the issue of the Crown patent, for arrears of taxes assessed against the interest

of the occupant, being the homesteader, prior to the issue of the patent, and the municipality is not, in such case, limited to the special method of collection provided by s. 146.

In any event the sale will not be set aside when some of the taxes for which the lands were sold were assessed after the issue of the patent.

Trueman, for plaintiff. *Hannesson*, for defendant.

Metcalfe, J.] JOHNSON *v.* HENRY. [April 10.

Practice—Stay of proceedings—Meaning of expression "usual stay."

When, at the close of the trial, counsel for the losing party asks the judge to grant the "usual stay" and the judge says "yes," and nothing more is said, the meaning is that the successful party may sign judgment, but may neither issue an execution nor register a certificate of judgment until after the lapse of the time allowed for appealing from the decision.

Galt, K.C., for plaintiff. *Symington*, for defendant.

Robson, J.] WRIGHT *v.* ELLIOTT. [April 13.

Practice—Costs—Action against member of legal firm, one of whom is not a solicitor—Counsel fees paid to partners in law firm—Law Society Act, R.S.M. 1902, *c.* 85, *ss.* 52 *and* 59.

Held, 1. No solicitors' fees should be allowed on the taxation as against the plaintiff of the costs of the successful defence of an action against one member of a legal firm for whom the firm acts as solicitors, when another member is not a solicitor.

Lindley on Partnership, 7th ed., at p. 136; *Plissson* v. *Skinner*, 5 Terr. L.R. 391, and *Brown* v. *Moore*, 32 S.C.R., at p. 97, followed.

2. The defendant, however, may, in such a case, tax counsel fees actually paid to his partners. *Johnston* v. *Ryckman*, 7 O.L.R. 511, followed.

Tench, for plaintiff. *Deacon*, for defendant.

Robson, J.] IN RE JICKLING. [April 13.

Practice—Surrogate Court, transfer from, to King's Bench.

When a contentious matter arising in a Surrogate Court between the proponents of two different wills of the deceased is

transferred to the Court of King's Bench under s. 63 of the Surrogate Courts Act, R.S.M. 1902, c. 41, it is necessary that a statement of claim in the King's Bench should be filed and served before any other step in the cause is taken. *Doll* v. *Howard*, 11 M.R. 73, followed.

The party who commenced the litigation in the Surrogate Court by petitioning for probate should be the plaintiff in the King's Bench.

Trueman, for plaintiff. *A. B. Hudson*, for defendant.

Mathers, C.J.] DESAULNIER *v.* JOHNSTON. [April 22.

Practice—Solicitor and client—Præcipe order for delivery of bill of costs—Undertaking to pay amount taxed.

Held, 1. A præcipe order for the delivery and taxation of a solicitor's bill of costs, taken out by a client under Rule 964(*a*), added to the King's Bench Act by 10 Edw. VII. c. 17, s. 12, should, under s. 43 of the English Solicitor's Act, 6 & 7 Vict. c. 73, which is still in force in Manitoba, be styled in the matter of the solicitor and not in the action in which the costs were incurred.

2. It is not necessary that such an order should contain an admission of the retainer.

3. Neither is it necessary that such an order should contain a submission on the part of the client to pay the amount found due on the taxation: see King's Bench Act, Form 104; although when the client applies, after a month from the delivery of the bill, for a reference to taxation it would be proper to require such submission; and in no case is there authority to impose such a condition when the application is merely for the delivery of the bill.

4. Under said Rule 964(*a*) an order may be taken out for the delivery of a bill simply without adding the word "taxation."

In re West King and Adams (1892) 2 K.B. 107; *Duffett* v. *McEvoy*, 10 A.C. 300, and *Re McBrady* v. *O'Connor*, 19 P.R. 37, followed.

Phillipps, for plaintiff. *Blackwood*, for solicitors.

Book Reviews.

The Law of Costs in Canada. By His Honour Judge Widdifield, Junior Judge of the County of Grey. 2nd ed. Toronto: Canada Law Book Co., Limited, 32 Toronto St. 1911. Price, $6.

This book is already so well known, that it is unnecessary to say much about it, except to again commend it as a necessary adjunct to every properly equipped practitioner's library, especially in the province of Ontario. Very useful, also, in the other provinces (except Quebec) where the law and practice as to costs is almost the same. Many changes have necessarily been made and a large number of authorities, both English and Canadian, have been examined and referred to in this edition. The necessity of a new book on this subject is apparent, as it is ten years since we had any work on the subject in this country. We note, as most useful, that the differences between the English and Canadian rules are pointed out, so that the practitioner can tell at a glance the extent to which an English case is applicable to the conditions in this country.

The Law of Prohibition at Common Law and under the Justices' Acts. By H. R. Curlewis, B.A., and D. S. Edwards, B.A., Barrister-at-law, Sydney, Aust.; with a chapter of the practice in England by F. J. Wrottesley, Barrister-at-law. London: Sweet & Maxwell, Limited, 3 Chancery Lane. Sydney: The Law Book Co., of Australasia, 72 Castlereagh Street. 1911.

This is a new departure, bringing into prominence our possessions in Australasia and the courts therein. The book is said to be founded on the decisions of the courts of England and Ireland; of the High Court of Australasia; the Supreme Courts of New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia, and the Supreme Court and Court of Appeal of the Dominion of New Zealand.

It would seem to be a great pity that the learned editors had not included in their excellent work the decisions of this Dominion on the subject treated.

The subject is an important one and there is not much help to be had from text books. The study itself is a very interesting one and is shortly referred to in the preface. The contents are

grouped as follows: Part I. Common Law of Prohibition, in which appear the nature and origin of this branch of the law; excess of jurisdiction; prohibition in aid; natural justice, and a large amount of learning under other heads; Part II. consists of Parties, Practice and Costs.

The plan of the work is to give general propositions, tersely stated, followed by a reference, the leading cases substantiating them with full notes thereon. The book, as to matter, as to mode of construction and in literary style is a first rate production. It will be found to be most interesting reading to the profession, as well as a mine of information subject of prohibition and kindred topics. Not the least part of its interest in this country is the view it gives to us here of the judicial mind in the antipodes. We hope soon to see an edition which will gather together the law on the subject of Canada as well as some other portions of the British Empire.

Introduction to the Science of Law. Systematic survey of the Law and Principles of Legal Study. By KARL GAREIS, Professor of Law at Munich. Translated from the third revised edition of the German by ALBERT KOCOUREK, of the Chicago Bar; with an introduction by ROSCOE POUND, Story Professor of Law in Harvard University. Boston Book Company, Boston, Mass. 1911.

It is said that the purpose of this translation is to make valuable to English speaking people one more important contribution to legal science; and doubtless this juristic survey of Dr. Gareis is one of the best and one of the best-known of this class of works.

It may be said without fear of contradiction that the study of the law as given in Law Schools of modern days, at least so far as this country is concerned, turns out better lawyers than the system, or rather want of system, which was in vogue before their introduction; and that it gives not only a better legal education, but also that most important knowledge, the place to find the law applicable to the case in point. Whilst this is true we doubt whether the study of legal science and the philosophy of laws is of much advantage in legal education from a general practical standpoint. At least the time that would be necessary to acquire a knowledge of the philosophical and historical learning of this branch might be better spent in other lines. Life is not long

enough to learn everything. The above work, now in its third edition, has a great reputation, and for those who have time for a full knowledge of such subjects it would be indispensable.

Questioned Documents. A study of questioned documents, with an outline of methods by which the facts may be discovered and shewn. By ALBERT S. OSBORN, Examiner of Questioned Documents, with an introduction by Professor John H. Wigmore, author of Wigmore on Evidence. Rochester, N.Y.: The Lawyers' Co-operative Publishing Co. 1910.

The introduction begins as follows: "A century ago the science of handwriting did not exist. A crude empiricism still prevailed. This hundred years past has seen a vast progress. All relevant branches of modern science have been brought to bear. Skilled students have focused upon this field manifold appurtenant devices and apparatus. A science and an art have developed."

The work, which is to assist in the discovery and proof of the facts in hand investigation or legal enquiry involving the genuineness of a document. The writer gives the proved results of the latest investigation on such subjects; and illustrations are introduced to make clear the points under consideration. Definite instructions are also given regarding the investigation of the several classes of questioned documents, with a chapter on photography and the use of a microscope. The old Book says that the heart of man is deceitful and desperately wicked, but the wickedness develops in different lines according to circumstances; in these days it develops largely in the way of forgery; hence the value of such a work as the one before us.

The Lawyers' Reports Annotated. New Series, Book 29. BURDETT A. RICH, HENRY P. FARNHAM, editors. Rochester, N.Y.; The Lawyers' Co-Operative Publishing Co. 1911.

This series of reports comes to us with unfailing regularity and is as much a mine of legal lore as ever. We heartily recommend it to our readers. There comes with it the usual index of cases in the previous volumes.

Statutes of Practical Utility, passed in 1910, *with notes* by W. H. AGGS, M.A., LL.M., Barrister-at-law, of the Inner Temple. London: Sweet and Maxwell, 3 Chancery Lane, and Stevens and Sons, Limited, 119 and 120 Chancery Lane.

This collection of statutes is the continuation of the well-known series "Chitty Statutes." Of the 38 public general

statutes passed in Great Britain in 1910, 21 have been selected as "statutes of practical utility" applicable to the United Kingdom, England or London.

The Annual Digest. London: Sweet & Maxwell, Limited, 3 Chancery Lane; Stevens & Sons, Limited, 119 and 120 Chancery Lane, Law Publishers. 1911.

This volume includes all the reports of the decisions of the Superior Courts of England, with a selection from the Scottish and Irish cases. It contains also a collection of cases followed, distinguished, explained, commented on, overruled or questioned with reference to the statutes passed during the year 1910. With a view to facilitate the noting-up of these cases there is given a note of the cases printed on one side only for cutting up.

Stone's Justices' Manual for 1911. 43rd edition. By J. R. ROBERTS, ESQ., Solicitor, Clerk to the Justice, etc. London: Shaw & Sons, 7 and 8 Fetter Lane; Butterworth & Co., 11 and 12 Bell Yard, Temple Bar, Law Publishers. 1911.

It is only necessary to call attention to the fact that another edition of this Manual has been issued. It is indispensable to magistrates and practitioners in England; and contains much that is useful to the same classes in this country. It has now grown to a book of 1471 pages.

Flotsam and Jetsam.

The law does not consist in particular instances, though it is explained by particular instances and rules, but the law consists of principles, which govern specific and individual cases, as they happen to arise.—Lord Mansfield, *R.* v. *Bembridge* (1783) 22 How. St. Tr. 155.

Law grows, and though the principles of law remain unchanged, yet (and it is one of the advantages of the common law) their application is to be changed with the changing circumstances of the times. Some persons may call this retrogression, I call it progression of human opinion.—Lord Coleridge, *Reg.* v. *Ramsay* (1883) 1 Cababe and Ellis' Q.B.D. Rep. 135.

Canada Law Journal.

VOL. XLVII. TORONTO, MAY 15. No. 10.

THE LEGISLATION OF LAST SESSION.

The Ontario statutes passed at the late session of the Legislature have been issued with commendable promptness. The legislative labour has resulted in a volume of 1,000 pages.

Among the noticeable Acts of the session is that relating to the protection of the public interests in the bed of navigable waters (chapter 6), which, however, is not to take effect until proclaimed by His Honour the Lieutenant-Governor. The policy of this Act is to protect the water powers of the country from being monopolized by private individuals to the prejudice of the public, and it has practically reversed the rule of the common law, that the grant of land on the banks of a navigable stream entitles the grantee to the bed of the stream ad medium filum. Some objection has been made to this legislation on the ground of its interference with private rights, but reasonable protection seems to be provided for any existing rights and the Act will prevent the future acquisition of such rights to the prejudice of the public.

As usual we have a Statute Law Amendment Act (chapter 17), a sort of omnibus Act amending sections in many statutes, arranged apparently wherever possible on a sort of crab-like principle, viz., so that you may go backwards instead of forwards. If, for instance, two sections in a statute are to be amended, the latter one is first amended and then the earlier, e.g., to take a few specimens, s. 7 amends s. 21 of 8 Edw. VII. c. 28, and the following section then adds sec. 20a to the same statute; s. 9 (1) amends ss. 73, 141, 154 of 7 Edw. VII. c. 34, then subsecs. 2 and 3 make further amendments in s. 73; s. 15 (2) amends s. 4 of 9 Edw. VII. c. 72; and sec. 16, then amends 9 Edw. VII. c. 70; ss. 20-28 amend various statutes of 10 Edw. VII.; then s. 29 amends an Act of 9 Edw. VII.; s. 31 (3) amends s. 88 of

the Registry Act and sub-s. 4 then amends s. 80 of the same Act, and so it goes all through the Act, jumping from one volume to another, and from one section back to a preceding section in the usual promiscuous way.

A very little trouble would be required to introduce a little order into the annual batch of statute amendments, and the amendments could be so arranged as to begin with the Revised Statutes and proceed in regular order with the various other amendments made to statutes according to the chronological order in which such statutes were passed. This would make the work of keeping track of statute amendments (a by no means easy task), somewhat easier. We again take this opportunity of offering this practical suggestion to those responsible for the arrangement of the provincial statutes, but there seems to be some sort of fascination about the "higgledy piggledy" plan of arrangement, and it really takes so much less trouble, that we despair that a saner method will ever find favour. What sec. 28 of this Act (c. 17) means, is a thing which will puzzle most people to understand; both the section and the marginal notes all appear to be wrong.

Among the other amendments effected by the Statute Law Amendment Act is one respecting the Registry Act, relating to discharges of mortgages. Under the former Act it was held that one of several executors could validly discharge a mortgage: *Re Johnson*, 6 P.R. 225, but under section 62 as now amended, it would seem probable that if there are several executors or administrators, all must join in the discharge.

The amendment to the Execution Act, s. 24 (6), making lands assets for the payment of debts due to the Crown or to subjects, is merely an affirmance of what was already the law of this province, under the Imperial Statute 5 Geo. II. c. 7, which, though repealed (50-51 Vict. c. 59) as regards England, was expressly continued in force as regards Ontario. This Act ought to have been included in the schedule Part IV. of volume 3 of the R.S.O. 1897, but possibly escaped the notice of the compilers of that volume owing to the statute having been repealed in

England. Its omission from that schedule did not, however, in any way affect its operation.

By sec. 36 an amendment is made to the Married Women's Property Act, enabling a married woman who is a bare trustee of land to convey such land without her husband's concurrence.

By section 38, the removal of trustees is excluded from the equitable jurisdiction of County and District Courts.

By section 41 some provisions of the Judicature Act are transferred to the Mercantile Amendment Act. This may perhaps be with a view to a more orderly arrangement, but it will have the inevitable effect of making it hard to find in future, provisions with which the profession has become familiar in the Judicature Act. A useful amendment is made to the Surrogate Courts Act for the summary disposition by judges of those courts of disputed claims against the estates of deceased persons, without action. The clauses of R.S.O. c. 170 relating to the apportionment of periodical payments is revised as a separate statute, and following the method of revision of the statutes which has been going on for sometime past we have in the present volume the following further revisions.

Public Authorities Protection Act (R.S.O. cc. 88, 89, 326). Now 1 Geo. V. c. 22.

Coroners Act (R.S.O. cc. 97, 275 and amendments). Now 1 Geo. V. c. 23.

Fraudulent Conveyances Act (R.S.O. cc. 115, 334). Now 1 Geo. V. c. 24.

Conveyancing and Property Act (R.S.O. c. 119 and ss. 5, 10, 14-23 and 31-33 of c. 330; and clauses 2, 3, 5, 6, 11 of s. 58 of the Judicature Act). Now 1 Geo. V. c. 25.

Trustee Act (R.S.O. cc. 129, 131, 132, 336, ss. 10-20 of c. 337; ss. 63, 64 of c. 59; s. 39 of c. 51; 62 Vict. (2) c. 15; 63 Vict. c. 17, ss. 7 and 18; 1 Edw. VII. c. 14; 3 Edw. VII. c. 7, ss. 26, 27 and 9 Edw. VII. c. 59). Now 1 Geo. V. c. 26. (Not to come into force till 1st June, 1911.)

Custody of Documents Act (R.S.O. c. 137). Now 1 Geo. V. c. 27.

The Land Titles Act (R.S.O. c. 137 and amendments). Now 1 Geo. V. c. 28. (Not to come into force till 1st Sept. 1911.).

The Water Privileges Act (R.S.O. c. 141). Now 1 Geo. V. c. 29.

The Conditional Sales Act (R.S.O. c. 149, and s. 41 of c. 148). Now 1 Geo. V. c. 30. (Not to come into force till 1st July, 1911.)

The Apprentices and Minors Act (R.S.O. c. 161). Now 1 Geo. V. c. 31.

The Marriage Act (R.S.O. c. 162 and amendments). Now 1 Geo. V. c. 32. (Not to come into force till 1st Sept. 1911.)

The Fatal Accidents Act (R.S.O. c. 166). Now 1 Geo. V. c. 33.

The Deserted Wives Maintenance Act (R.S.O. c. 167 and amendments). Now 1 Geo. V. c. 34.

The Infants Act (R.S.O. c. 168 and ss. 2, 3, 12, 18 of c. 340 and par. 12 of s. 58 of Judicature Act). Now 1 Geo. V. c. 35.

The Illegitimate Childrens Act (R.S.O. c. 169). Now 1 Geo. V. c. 36.

The Landlord and Tenants Act (R.S.O. cc. 170, 171 and 342, and ss. 13, 14 of c. 129, and ss. 8-11 of c. 340, and s. 11 of c. 337 and 10 Edw. VII. c. 75). Now 1 Geo. V. c. 37.

The Anatomy Act (R.S.O. c. 177). Now 1 Geo. V. c. 38.

The Dentistry Act (R.S.O. c. 178). Now 1 Geo. V. c. 39.

The Pharmacy Act (R.S.O. c. 179). Now 1 Geo. V. c. 40.

The Land Surveyors Act (R.S.O. c. 180). Now 1 Geo. V. c. 41.

The Surveys Act (R.S.O. c. 181 and amendments). Now 1 Geo. V. c. 42.

The Architects Act (R.S.O. c. 182 and amendments). Now 1 Geo. V. c. 43.

The Stenographic Reporters Act (R.S.O. c. 183). Now 1 Geo. V. c. 44.

The Veterinary Surgeons Act (R.S.O. c. 184). Now 1 Geo. V. c. 45.

The Stationary Engineers Act (6 Edw. VII. c. 26; 7 Edw. VII. c. 32; 9 Edw. VII. c. 65, s. 1; and 10 Edw. VII. c. 26, s. 29). Now 1 Geo. V. c. 46.

The Ontario Cullers Act (R.S.O. c. 186). Now 1 Geo. V. c. 47.

The Chartered Accountants Act (46 Vict. c. 62 and 10 Edw. VII. c. 79). Now 1 Geo. V. c. 48.

The Innkeepers Act (R.S.O. c. 187 and amendments). Now 1 Geo. V. c. 49. (Not in force till 1st July, 1911.)

The Pawnbrokers Act (R.S.O. c. 188 and amendments). Now 1 Geo. V. c. 50.

New provisions are made in regard to local improvements in municipalities by chapter 58, which regulates the works which may be so undertaken, and the procedure in reference thereto, and how the cost is to be borne.

New provisions are also made by chapter 64, in regard to liquor licenses and particularly for increasing the license duties.

By chapter 66 we notice that restrictions are placed on the sale of lethal weapons which it is to be hoped may remove from our Italian immigrants a temptation to cut each other up, which they seem to find hard to resist.

We presume we may now be looking for the speedy publication of a new edition of the Revised Statutes, and having regard to the care which has been taken in really revising the statute law, we confidently expect that it will be found to be a marked improvement on previous efforts of that kind.

UNLICENSED CONVEYANCERS.

This subject comes up periodically and we publish in this issue a letter from a subscriber in reference to it. The country profession certainly have reason for complaints they make, and a remedy should be found. In the case brought up by our correspondent the Law Society of Upper Canada would seem to have jurisdiction.

The position which the Society has taken in reference to cases such as that referred to is that if the facts therein set forth are found to be correct the same would amount to a contravention of sec. 6 of the Solicitors Act, and likewise of Rules 5 and 46 of the Surrogate Court of the Province of Ontario.

By the Rules of the Law Society, as amended May 21st, 1908, any solicitor having a complaint to make against a solicitor, or any person acting in any of the Courts as a solicitor, without having been duly enrolled as such, may make it to the Secretary of the Law Society (who is to treat as confidential the name of such complainant) and to inquire into and report on the facts to the Chairman of the Discipline Committee, who is thereupon through his Committee (but without disclosing the name of the original complainant) to submit the whole question to Convocation for action. This has been found to work very satisfactorily, and we have reason to think there would be no hesitation on the part of the Law Society in making a prompt and careful investigation. No expense or effort should be spared by the Society in thus protecting the interests of the profession.

INTERNATIONAL ARBITRATION.

The dream of humanitarians that the time is coming when all national disputes will be settled by an International Board of Arbitrators, and that thereby wars shall cease, still dominates the mind of a large portion of the writers on the Continent of Europe and an increasing number of those in North America who discuss this most important subject. Our thoughts have recently been directed to this subject by the production of a work of some pretention and ambition called the "New Code of International Law," published in furtherance of the objects of the American Peace Society, which is referred to in our review columns.

A view of the situation new to most people appears in a very remarkable article by Mr. Harold F. Wyatt, published in

a recent number of the *Nineteenth Century and After*. With a keener and longer sighted vision, with a fuller appreciation of the lessons of history and with a more accurate estimate of human nature (and all nations are composed of units of humanity) this writer forms conclusions which prick many bubbles of the peace advocates and draws attention to views and thoughts which when once carefully considered cannot be ignored and deserve the most profound attention of all lovers of their country,* which article appears under the title of "God's test by war" and is as follows:—

Amidst the chaos of domestic politics and the wavelike surge of contending social desires the biological law of competition still rules the destinies of nations as of individual men. And as the ethical essence of competition is sacrifice, as each generation of plants or of animals perishes in the one case, or toils or dares in the other, that its offspring may survive, so with a nation, the future of the next generation is determined by the self-sacrifice or the absence of self-sacrifice of that which precedes it. The bud flowers and the flower dies, and dying, flings its seeds on the winds to produce, if it may be, a wider re-creation of itself. And in the animal world the sacrificial impulse of maternal love fronts all peril and endures all suffering that its young may live. That impulse, in the latter manifestations of evolution, is the root source of all human families, and of all human morality. And it finds its crown in patriotism, in the sacrifice which a nation makes to fulfil the trust which it has inherited from its fathers, and to hand down that heritage, not diminished but increased, to the generations that succeed.

If the springs of national action fail; if at a crisis when international rivalry is acute a given generation shrinks from the effort and the sacrifice necessary to self-preservation, then that generation is a traitor at once to its past and to its future. It dishonours the dead, who, in their earthly hour, did make that effort and that sacrifice when the time called for these. To those noble dead it is an ingrate, and of its own children it is the fraudulent

*As we write the news comes that the Territorial Army scheme of the British Minister of War shews signs of proving a failure as recruiting for it is almost at a standstill. The significance of this will be better understood after the reading of Mr. Wyatt's article.

betrayer. For what it has, that it has received on the implicit condition that it shall pass it on. The soul is gone out of a people when it recoils from a duty which the claims of its history and of posterity alike impose. Has the soul gone out of England, or does it still inhere?

England is still the heart and core of the aggregation of nations and of races which owe allegiance, not to her, but to the crown of her sovereign—that crown whose influence the ages have extended into the wide spaces of the world. Considered from the standpoint of the true Imperialist, England is but a province; but she is pivotal province, the pivotal province of the British Empire. Upon her shoulders rests the main weight of that Empire's burden. From her long suffering taxpayers is derived by far the major portion of the revenue which supports the British navy and the British army. By her sons those Services are chiefly manned. Withdraw from their support the wealth of England, withdraw from their ranks her men, and the fabric of Empire must fall like a house of cards. . . .

As for the oversea dominions of the King, they are but now beginning to awaken to the realities of the world of competing nations of which they are a part. They have but begun to move in earnest, and, with the exception of New Zealand, they have as yet given no contribution to the common defence in the least proportionate to their financial or their numerical power. If England fell suddenly from her place in the House of the British peoples; if the support of the Flag were left with the oversea dominions, plus "the Keltic fringe," and the lowlands of Scotland, then there would be speedy end of the British Râj.

We may ask again, then, what of England? Is the heart that once was hers still strong to dare and to resolve and to endure? How shall we know? By the test. What test? That which God has given for the trial of peoples—the test of war.

Does this mean that with an insanity of action exceeding even the madness of neglected preparation England is to precipitate the unready Empire into conflict with the prepared and watchful foe? It does not imply any such criminal folly.

What it does imply is that victory is the result of efficiency, and that efficiency is the result of spiritual quality. Self-sacrifice, self-denial, temperance, hardihood, discipline, obedience, order, method, organizing power, intelligence, purity of public life, chastity, industry, resolution, are some only of the national and indi-

vidual attributes which go towards producing the efficiency of modern armaments. And the efficiency or inefficiency of its armaments is the determining factor of a nation's success, or of a nation's failure, at that culminating moment of long processes of commercial and diplomatic rivalry—the moment of war. Thus, then efficiency in war, or rather efficiency for war, is God's test of a nation's soul. By that test it stands, or by that test it falls. This is the ethical content of competition. This is the determining factor of human history. This is the justification of war.

In the realms of sub-human life, in the world of animals, as in the world of men, this law, perhaps so modified that its working would have been to us undiscernible, must still have prevailed. At least the tendency must have persisted that the higher organism should conquer the lower. For if there had been no such tendency, how could the higher organism have constantly emerged?

In the sweep of the ages, in the passage of time, the qualities that make for victory have assumed, gradually, nobler hue. In the confused conflicts of earlier times to detect the secret process by which the higher tended ever to supersede the lower must have been hard indeed. Many are the cases recorded in the annals of mankind when might has struck down right. Many more must be the unrecorded instances when the like occurred. But the course of development of human society depends not on exceptions, however numerous, but on the rule. And the rule was, as analysis shews, not that "might was right," but that *right always tended to create might*. By "right" is here intended no artificial conception, and no imagined claim to territory. For suppositious "rights" of this kind have in history no validity save when based on force. What is meant is a righteousness of national life which included all or most of the qualities enumerated above as producing efficiency in war. This is the only kind of "right" possessed by a people which has enduring value.

As regards the present, the truth of these statements can hardly be doubted by any reasoning mind. As regards the past, the briefest survey of salient facts will establish their correctness. The triumph of the Greeks over the Persians was the triumph of a higher civilization and a nobler manhood. Marathon and Salamis were as the swords that kept the gates of Europe against the barbarian, and they were the direct

fruit of a lofty spirit inhabiting a great race. When, later, the Macedonian phalanx penetrated the East, that penetration represented the victory of the higher intelligence and the greater discipline. The sequent overthrow of Greek by Roman was the result of an austerier morality, of a deeper devotion to national ends and of a more perfect union. Each one of these three events meant the advance of mankind; each was the product of a military efficiency founded on a higher morale.

But if these instances are in themselves striking; if these scenes in the drama of the development of man exhibit the working, through war, of what Matthew Arnold called "A something not ourselves that makes for righteousness"; far more impressive, far more awful, is the tremendous tragedy of which they were the prologue, and which bisects the history of the Western world. Towards the close of the fifth century, says Professor Freeman, "civilization perished in blood and flames." It is a brief phrase. Who is there who can realize its full intent? But the question we ask here is, why this gigantic catastrophe occurred—this disaster which flung back the march of human thought and human science for a thousand years? If there be one thing certain, it is that civilization tends to become stronger than barbarism. How comes it then that civilization fell before barbarism?

The answer to that question is to be found in the decay of the military spirit among the Roman people. That decay again was itself the product of the degeneracy of public and private morality. In other words, civilization perished because its spiritual quality failed. Not all the arts, nor all the literature, nor all the splendour and refinements of the Roman world saved that world from destruction at the hands of Vandals and of Goths. Ruthless, inexorable, the law of the survival of the fittest trampled on the corrupt. Of that law, war is the supreme instrument, and of war, in the long passage of the centuries, the deciding factor in the soul. This is not the doctrine of the market place, or of the political pulpit, or of the Radical Party. In the English-speaking world when the stern virtues which alone lead to national survival are decaying, it is not teaching likely to be popular. But it happens to be the inner truth which analysis of history reveals.

Let those who dispute this conclusion test the validity of their denial by applying it, not to the past, but to the present. Take away from the Japanese their patriotism, their public

spirit, their discipline, and their vast capacity for self-sacrifice, and, after these withdrawals, what will then remain of their naval and military power? Only the shell without the kernel; only the material without the moving spirit which gives that material life. Truly the question answers itself.

Let a like subtraction be made from the qualities possessed by the German legions, and how much of their present menace to Europe will remain? Take from the nations which have produced these forces their presevering industry and their resolute thoroughness, and then say whether their navies and their armies will retain their potency. Or fill these countries with debauchery, destroy the sanctities of family life, make sexual immorality in its widest sense not the exception, but the rule, and then consider how long either Germany or Japan would retain its place in arms.

But if it be true, as these and like considerations go to prove, that warlike efficiency at the present time is the price of moral and spiritual quality, and perishes if such quality die, then must not similar attributes have tended throughout history to produce similar effect?

The same causes must always have tended towards the same results, but the purpose immanent in the universe becomes more manifest as evolution proceeds. When the processes of war are crude, and when the scale on which it is waged is small, the effects are far less evident of those great underlying causes which in the passage of generations have produced, despite all exceptions, their destined ends. But now when armaments are the epitomes of nations, and when the capacity to bear those armaments sums up the progress of a people, those who have eyes to see can at least divine the ethical content of war. Defeat in war is the fruit of naval and military inefficiency, and that inefficiency is the inevitable sequel to moral decay. Victory in war is the method by which, in the economy of God's providence, the sound nation supersedes the unsound, because in our time such victory is the direct offspring of a higher efficiency, and the higher efficiency is the logical outcome of the higher morale.

At the stage of development which mankind has now reached, those great human families which we call nations still constitute in the main the fundamental divisions of the whole race. These nations possess for the most part an intense organic life of their own. They are in fact individual organisms. Each organism,

while health animates it, feels the same impulse to grow and to compete with its rivals for increased means of subsistence which all knowledge and all experience present to our eyes in the sphere of biology, of which sphere nations in actual fact form a part.'

And just as in the earlier and humbler domains of that sphere the higher type ever tended to survive, so in this later period of biological development the higher and the nobler people tends always to secure victory in that culmination of international competition which we call war. Hence it follows that if the dream of short-sighted and superficial sentimentalists could be fulfilled—that is to say, if war could suddenly be rendered henceforth impossible upon earth (which is at present impracticable)—the machinery by which national corruption is punished and national virtue rewarded would be ungeared. The higher would cease to supersede the lower, and the course of human evolution would suffer arrest.

This is a conception of the function of war which (as I venture to believe) has not been hitherto placed directly before the public. It is a conception which will be profoundly repugnant to those that think that they know better than the Power behind phenomena how the affairs of this, and perhaps of other worlds, ought to be arranged. Ceaseless efforts are being made alike in the United Kingdom and in the United States to destroy what remains of the military spirit in the Anglo-Saxon race. War, and the preparation for war, without which it brings defeat, are represented as barbaric survivals which can be abolished by international agreements. With such an object Mr. Carnegie has recently invested two millions sterling in a trust, with, it is said, the sagacious proviso that the balance, after the object has been attained, shall be devoted to some further worthy end. At the present epoch of the world's history, Mr. Carnegie might just as well have created a trust for the abolition of death, with the understanding that after this trifling change in human conditions has been achieved, the remaining funds should be assigned to the endowment of asylums for the imbecile.

For however frightful an evil war may appear, it is at any rate far less fatal to the human race than death, of whose manifestations it is a part. But than the part the whole is greater, and thus is death greater than war. Yet death is essential to human life, as we know it. For if there were no death, how

would the existence of mankind upon this planet be thinkable? At all events, the increase of such life would have had to cease thousands of years before the present era, so that none of those who are now shocked by the idea of war would ever have been born. For if there had been no death since life first stirred, far back in the depths of terrestrial time, then long ago, unless soon the growth of that life had ceased, there would have been no more room for vegetation, or for animals, for fishes or for men. Nay, more—since all life, other than that of vegetation, thrives on other life, ceaseless starvation must have been the lot of all sentient things.

The dream of a planet, traversing space, deep laden with stirless and foodless masses of life, life sentient, life individual, piled in its myriad millions of units into mountains higher than Atlas—life doomed to endure through the æons because it cannot die—this dream exceeds in horror any vision which Dante ever imagined of in the innermost hell. The paradox, therefore, is true that in this globe of ours (as probably in all other worlds throughout space which life inhabits) death is the condition of the increase of life.

But of death war is the scythe. Throughout the periods of biological time war has been the road to food, and since man was developed, war has been the condition of human advance. Men may fear war as they fear death, and shudder as they hear war's footfall (never far removed) encompass the edifice of their house of national being. But as, despite its horrors, death is still essential to mankind, so also is war. Death and war, those grim twin brethren, ride the rush of this world's tide and put the bit in the mouth of man.

If, therefore, we could conceive that, far on in the ages, that which is mortal should become immortal, in a sense not spiritual but material, then, as we have just seen, this immortality will bring another kind of death—the death of physical increase. For in any limited sphere physical immortality and physical increase cannot co-exist. But if in like manner we dared to conceive the cessation of war, then we must also conceive the cessation either of sin or else of human progress. For now defeat in war is the punishment of national unrighteousness, but, then, that punishment would cease. Where there was corruption, that corruption would continue; where there was oppression, that oppression would abide. Though infamy brought weakness, weakness would not bring overthrow. Though

righteous dealing brought national strength, national strength would not bring national victory. Therefore if, while nations remain, war is to be abolished, then unless the degeneracy of peoples can also be prevented, "there shall be no more war" must mean "there shall be no more progress."

But suppose that we seek to conceive some distant date, some day still in the depths of coming time, when, through intermarriage following intercommunication, all nations and all races shall have been merged into a single whole, when, throughout the bounds of our planet, one tongue is spoken, and nations make no more war because there are no more nations, would what is impossible now become possible then? Since in this our day the operative cause of war is international competition, would the removal of that cause remove war also?

Not necessarily, because as civil war has in the past often been waged within an individual nation, so it might be waged then within the one nation of mankind. In generations not very remote wars have been waged for religion, and wars have been waged for ideas. Even now in Africa, in Asia, and in Eastern Europe great numbers of fighting men exist who are ready to die in battle for their creed. (These are they who believe in one God and in Mahomet as His prophet, and their faith is not waning, but increasing). Therefore, though, while nations last, the present cause of conflicts must endure, the abolition of nations would not inevitably involve the abolition of war. In such a distant time as that which we are here contemplating, the inhabitants of this world may have arranged themselves in divisions other than national, and, as now between nations, so then between those divisions, competition may produce war. So long as those conditions lasted, the machinery for securing ethical advance would remain. Because righteousness brings warlike efficiency, therefore in the majority of cases righteousness as now would triumph over its opposite. But if those conditions ended; if the possibility of war absolutely passed away; then, *unless in the meantime human nature had radically changed,* the upward march of human morality would terminate because the terrific punishment which war provides for human degeneracy would be removed. In other words, war will cease to be a necessity only when corruption ceases to be a fact.

If this argument possess validity, then the deduction follows that while human nature remains what it is at present,

war must retain its place beside death as a vital and essential part of the economy of God. The Lord of Hosts has made righteousness the path to victory. In the crash of conflict, in the horrors of battlefields piled with the dead, the dying, and the wounded, a vast ethical intention has still prevailed. Not necessarily in any given case, but absolutely certainly in the majority of cases, the triumph of the victor has been the triumph of the nobler soul of man. Though to this rule history may furnish a thousand exceptions; though in history war has been made a thousand times over the instrument of cruel oppression and of diabolical wrong, yet in that great majority of instances which determines general result the issue of war has made for the ethical advantage of mankind. It must have been so; it could not be otherwise, because ethical quality has tended always to produce military efficiency. With true insight, therefore, did Tennyson write of "The Battle-Thunder of God." He has made of war His instrument wherewith to subdue nations who have broken His laws, but those who would read the processes of His courts in the ages of the past must take for their study, not generations, but centuries, and groups of centuries. They must survey the time as from a mountain summit, and then in the vast horizon they can discern the flashing of His lightning and hear the rolling of that thunder of which the discharge has purified, from epoch to epoch, the atmosphere of the world.

But to those whom the exceptions to this law of God appal; to those who can see in former conflict only confusion and purposeless slaughter and evil often triumphant over good—to these the contemplation of the present working of the same law among mankind, as mankind now is, may well bring comfort and assuaging hope. For, as always with great sequences of cause and effect, the vaster the scale the plainer the connection. As humanity gathers itself into larger divisions, the instances in which in war the unrighteous smite down the righteous must tend ever to become rarer and yet more rare. A small people, a State of limited extent and insignificant resources, even though of high military efficiency, must always have been exposed to overthrow by overwhelming numbers in a conflict with some greater foe or coalition of foes, even though these were of inferior military virtue to its own. But if in place of a small people we have a great one, and, instead of a little State, one of wide extent and immense resources, and if the people of this State possess military virtue of a high kind, then it is manifest that the

probability of their being crushed by the numerical preponderance of inferior antagonists, if not altogether removed, becomes at least far less than in the former case. Moreover, as has been already partly shewn, the relationship between righteousness of national life on the one side, and military efficiency on the other, is incomparably plainer in modern days than in earlier centuries, or, for the sake of example, let us say, eight hundred years ago.

Now, in wars between great peoples, vast and coherent organization is necessary to secure national victory. Now, immense armaments have to be created, and the power to produce and to sustain those armaments, and to inform them with the spirit of life, is the measure of the whole moral and economic capacity of a people. Moreover, such capacity must be developed on the lines on which human evolution is proceeding—that is to say, on the lines on which the Power behind phenomena is working—or else it fails of effect. For no nation which hides its talents in a napkin, no nation which has not energy and ability can either render efficient, or long support, the vast navies and armies of our time. Preparation for war is the enemy of sloth. Preparation for war is the dissolvent of apathy. Victory is the prize not alone of present self-sacrifice and present energy, but also of previous self-sacrifice and previous energy. Briefly, victory is the crown of moral quality, and therefore, while nations wage war on one another, the "survival of the fittest" means the survival of the ethically best.

When in the fourteenth century the archers of England shot death into the ranks of the chivalry of France; when England alone among the peoples of Europe possessed an infantry which had predominant value in war, was not the prowess of those good English yeomen the direct product of a national life superior in its social state and in its moral quality to that of the French, or perhaps of any other European people of that day? If so, Crecy and Poictiers and Agincourt were the direct outcome of a higher military efficiency proceeding from a higher morale. Again, when in Elizabethan days the Puritan mariners of our seaports laid the foundation of empire by vindicating at the cannon's mouth the freedom of the seas, was there not in those men, in their daring, in their initiative, in their stern energy, moral quality of a high kind—of a kind higher than that of the Spaniard whom they vanquished?

These are but instances of that vast and as yet untrodden field of history in which is to be sought the part which moral

quality has played in determining the rise and the decline of nations, the moral impulse that has led to victory, and the moral decay that has preluded defeat.

But if study conducted on these lines would illumine the past, far more would it illumine the present. Why is it that now, when their material resources are greater far than any of which in recorded time any people ever boasted, the whole Anglo-Saxon race, alike in the British Empire and in the United States, is in visible peril of overthrow at the hands of rivals far poorer, in the case of Japan, and in that of Germany of dominions incomparably less rich and less extended? Because their women shrink from motherhood and their men from the practice of arms. And of both avoidances the cause is the same, namely, the absence of that spirit of self-sacrifice which is the very essence of spiritual life. If that spirit dominated England to-day, would Englishmen decline the first duty and the first privilege of all who are not serfs—the duty and the privilege of rendering themselves fit to defend that freedom which their manlier forefathers won for them and left to them? If Englishmen were worthy of that bequest, would they hide, as now, careless of the claims of Empire, behind their ships? And would they, while crouching thus, suffer—with a madness of folly to which history affords few parallels—the relative decline even of the very fleet which is their only safeguard, until, within three years from now, they must have either but a bare equality to Germany in the North Sea—twenty-one British to twenty-one German Dreadnoughts—or else surrender the Mediterranean, and with it Malta, Egypt, and the route to the East, to the mercy of Germany's pledged allies?

The truth is that armaments are the reflection of the national soul. The immense naval and military strength of Germany is the reflex of moral and social conditions better than our own. The excess of her birthrate over ours (and still more over that of France) is in itself the proof of that superiority. For the growth of her population involves not the production of degenerates, but of a sound and vigorous race. Patriotism, public spirit, frugality and industry are the essential moral factors which render possible the vast armed force which Germany wields. And in all these factors it must be admitted, with whatever shame and sorrow, that she surpasses England. Therefore, if in the gigantic process of international competition England fall before Germany—which fate may God avert—then that fall

will follow from no other destiny that the destiny inwoven with the universal law which in this article I have attempted to set forth, the law that the higher morality tends to produce the greater military strength.

If in all these considerations any force be admitted to inhere, then clearly the duty of patriotism and of preparation for war is reinforced ten thousandfold. If what has been here advanced is sound, then from every pulpit in the land the voice of exhortation should be heard, urging every man and every woman to serve God in and through service to their country.

The discovery that Christianity is incompatible with the military spirit is made only among decaying peoples. While a nation is still vigorous, while its population is expanding, while the blood in its veins is strong, then on this head no scruples are felt. But when its energies begin to wither, when self-indulgence takes the place of self-sacrifice, when its sons and its daughters become degenerate, then it is that a spurious and bastard humanitarianism masquerading as religion declares war to be an anachronism and a barbaric sin.

Yet this cry of weakness is sporadic only and alters no world facts. War remains the means by which, as between nations or races, the universal law that the higher shall supersede the lower continues to work. From Great Britain and from the United States, whence the military spirit is passing away, this bleat of feebleness is now proceeding. But it is not heard among the two most energetic and efficient peoples now upon earth. It is not heard in Germany, and it is not heard in Japan. The wolf who has lost his teeth does not wish to fight, but the wolves whose jaws are still strong do not share his pious desire.

Even while this article has been penned, a new and astonishing outburst of sentimentality has been witnessed in the Anglo-Saxon world. President Taft has declared himself, according to report, in favour of the application of the principle of arbitration even to questions involving national honour and national independence. One single interrogation is sufficient to display the utter hollowness of this attitude. Is the President of the United States willing to submit the Munroe doctrine to such arbitrament? And if the award of the Jurists of the Hague Tribunal is given against him, are he and the people of whom he is the official chief willing to see, first the inhabitants of Japan, and, in sequent time, the myriads of China, pour into South America

and Mexico, found States under their own flag, and establish an immense military organization on the land frontiers of unarmed, English-speaking North America? Nay, if the Japanese claimed, and the Court of Arbitration allowed, an unrestricted immigration of the yellow race into the Anglo-Saxon area, is this generation of United States citizens ready passively to submit? If so, then those citizens are potentially slaves already, and they deserve the doom which would inevitably be theirs, for they would be guilty of the greatest act of betrayal, alike of their forefathers and of their posterity, of which the annals of mankind record any trace.

But if, as is of course the fact, the people of the States, even though they appear to have lost all military instinct, are yet not so deeply degraded as to incur this gigantic infamy, then their refusal withdraws an entire continent from arbitral award, it denies to the yellow nations what to them seem their most natural and righteous demands, and it fixes the determination of the latter to achieve by war those great ends which in no other way can they possibly attain.

The real court, the only court, in which this case can and will be tried is the court of God, which is war. This Twentieth Century will see that trial, and in the issue, which may be long in the balance, whichever people shall have in it the greater soul of righteousness will be the victor.

This single instance suffices to shew the unutterable folly of all those in this country, or in the States, who imagine that, in any time to which the eye of living man can see, artificial agreements can arrest national growths.

But the full absurdity of this idea becomes revealed only when we reflect upon the nature of the considerations which alone must guide the Board of Jurists who are to decide the destiny of nations and the distribution of raecs upon earth. They will have to make that decision in accordance with the existing status quo and with bits of paper which are written treaties. But the status quo is the very thing which, in the case of America, the yellow race claims the right to smash. And in face of such a claim, the bits of paper are bits of paper and nothing else.

The Hague Tribunal would say in effect to the Japanese plaintiff: "Three hundred years ago the ancestors of some few of the present denizens of the United States went to America, and in the course of these three subsequent centuries their descendants, or other subsequent immigrants, or the descen-

dants of these, practically extirpated the previous sparse population, overran the country, cultivated it, made roads and railways through it, and built great towns. Therefore, it is theirs to do with as they will, and if they choose to say that they will not suffer the unrestricted entrance of your own population, even as peaceful settlers, you must submit, because nothing short of compulsion by force, which is war, could alter this resolve. Recollect that war is wicked, and abandon accordingly your national ambitions. Moreover, you must remember that some eighty years ago a president of the defendant Republic declared what is called "the Monroe doctrine," by which he asserted the intention of this Republic to prevent any non-American State from acquiring in future one foot of land in any part of the whole American continent. We are sorry that this intention should so completely frustrate your national desires, but it still holds, and it cannot be broken except by war, which the supporters of this Monroe doctrine, like their kinsfolk in England, consider to be wrong and do not want to have. Indeed they are not prepared for it. Therefore, go away, and be good."

Japan might say in reply: "That the defendant Republic is in present possession of the territory which it claims as its own, or that it has long enjoyed that territory, is no reason why we should be kept out of it now. They have had their turn and we mean to have ours. Let them keep us out if they can. As for their Monroe doctrine, it seems to us the most monstrous claim of which we have ever heard. We are driven to desire new territory by the strongest impulses which can animate a nation. Our population is increasing with prodigious speed. Our men are warriors. They have fighting blood in their veins. We love our country and we desire the increase of its power and its dominion with a passion which you pale Westerns seem no longer able to understand. We have made already great efforts and great sacrifices to secure the ascendency of our race in coming time, and we are ready and eager to make greater efforts and greater sacrifices yet. We will win that ascendency, or we will die. At this very moment we are absolute masters of the waters of the Eastern hemisphere of the globe. The waning fleet of Britain is tied to its own shores by the German menace. The fleet of the United States recently took four months to pass, during peace, from its Atlantic to its Pacific seaboard. It would require time still longer during war, because it could not coal at neutral ports. When it arrived, we think we could

treat it as we treated the Russian fleet in the straits of Tsushima. At any rate, that issue we are prepared to submit—not to you—but to the God of battles.

"Moreover, we have already taken steps and expended substance in order to make sure in advance of victory against the United States. Many thousands of our troops are already established in the guise of settlers in the Pacific slope and in Mexico, and as we could reinforce them to the full extent of our military strength through our complete command of the sea, it is even now beyond the power of the States to expel them. They have been warned of all this by a book called "The Valour of Ignorance," and their War Department has reported to their Congress that an army of 450,000 men is required for either seaboard. But they pay no heed, and therefore our chance is now at hand. Their politicians are ignorant of history and of war. Their men are, like women, untrained to arms. They gather wealth without seeing that wealth undefended is wealth that an enemy may seize. Unless they soon acquire that training, they shall be, ere many years are past, as hewers of wood and drawers of water to the yellow peoples. You tell us that war is wrong. We think it in exact accordance with the nature of man, we are certain that it is in accordance with our own nature, and we will see in it the only means by which a virile nation can supersede a nation that has grown soft. Perish your Hague Tribunal, with its old woman's babble, and let Japan go forward."

This reply is substantially the real answer which is now being made, not in words, but in acts, by Japan to the sentimentalists of England and of the United States.

In a strain not dissimilar is Germany by her acts giving response: "Our population also, like that of Japan, is still growing fast. We need outlets for it, and because the sense of nationality is strong within us, we desire, and we will have, those outlets under our own flag. But when we look forth into the world, we find all those temperate regions wherein our German folk might live and multiply and flourish already occupied by the Anglo-Saxon race, either in the British Empire, or in the United States, or in the rest of the American continent throughout which the Monroe doctrine forbids us to found our Colonies. Like Japan, we seek ascendency, and we seek dominion, and we seek also the material wealth which we think dominion will bring. Moreover, we too are a nation trained to arms, and we too have shewn in the past, and are ready to shew again, that we are capable of sacrifice to fulfil what we deem should be our

national destiny. But the British Isles, and the British Navy based on those Isles, are geographically interposed between us and the attainment of our national ambition. England, with that Navy, is as an armed bastion or outwork of the United States placed far on the East of the Atlantic. We cannot strike at her daughter States, we cannot strike at the great Republic, until we have defeated that Navy, until we have stormed that bastion. Therefore we will remain friends, the best of friends, with the remoter half of Anglo-Saxondom, until we shall have crushed that nearer half of it which lies at our doors. To achieve this end we have been steadily building a great fleet, and we have secured the co-operation of two allies, Austria and Italy, both of whom are now proceeding to build Dreadnoughts. Within three short years the fleets of the Triple Alliance will be a match for that of England, unless in the meantime England awakens to the reality of her situation and makes a great shipbuilding effort. [The writer enlarges on this proposition and then continues] :—

"But now you of the Arbitration Court tell us that war is an infamy. To us it seems the only means of fulfilling national purpose. To us preparation for war seems the first business of a Government. We have not neglected that business. Since England, and if the United States have neglected it, let them pay for their supine folly."

The fleets, the armies, and the diplomacy of Germany are in substance and effect speaking words like these throughout the world. Our forefathers would have heard this warning and met this peril, but now our public men, and many of the organs of our Press, appear incapable of analysis, and bent on nothing but the utterance of popular platitude. In nothing is this mental feebleness more plain than in the prevalent confusion of thought between an Anglo-American alliance, which is indeed a most urgent necessity in the interests of both peoples, and the idea of a universal alliance, precluding future war. This idea is, for the causes given, not only ineffably absurd, but also fraught with the most deadly mischief. Two unmilitary peoples, threatened by the same danger, speaking the same language, and largely even now of the same blood, may well find it expedient to unite such forces as they possess for their common defence against great armed nations. But to infer from the advisability of such a union that the reign of everlasting peace upon earth is about to begin, and that what remains of their military spirit may

therefore soon be suffered to lapse, is the very negation of human reason, and the surest method of securing their common downfall. The whole circumstances of the world prove the direct opposite of such belief. Never was national and racial feeling stronger upon earth than it is now. Never was preparation for war so tremendous and so sustained. Never was striking power so swift and so terribly formidable. What is manifest now is that the Anglo-Saxon world, with all its appurtenant Provinces and States, is in the most direct danger of overthrow final and complete, owing to the decay of its military virtue, and of the noble qualities upon which all military virtue is built. Throughout that world, in churches and in chapels, on the platform, as in the pulpit, in the Press, and on the stage, which is our chief temple now, the voice of every God-fearing man should be raised, through the spoken or through the written word, to kindle anew the spark that is dying, to preach the necessity of self-sacrifice for the country's cause, and to revive that dying military spirit which God gave to our race that it might accomplish His will upon earth.

The shadow of conflict and of displacement greater than any which mankind has known since Attila and his Huns were stayed at Châlons is visibly impending over the world. Almost can the ear of imagination hear the gathering of the legions for the fiery trial of peoples, a sound vast as the trumpet of the Lord of Hosts.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

SOLICITOR—UNDERTAKING BY SOLICITOR—ENFORCING UNDERTAKING—SUMMARY PROCEEDING.

United Mining and Finance Corporation v. *Becher* (1911) 1 K.B. 840. In this case the solicitor's appeal from a summary order made by Hamilton, J., to pay over money to a person not his client pursuant to his undertaking (1910) 2 K.B. 296 (noted ante, vol. 46, p. 612), was compromised, so that the question of law was not dealt with.

BANK ACT (R.S.C. c. 29), ss. 99-111—AGREEMENT BETWEEN BANKS—TRANSFER OF ASSETS BY ONE BANK TO ANOTHER WITH A VIEW TO LIQUIDATION OF LIABILITIES OF TRANSFERORS—CONSTRUCTION.

McFarland v. *Bank of Montreal* (1911) A.C. 96. This is an appeal from the Court of Appeal for Ontario on the question as to the validity of the agreement made between the Ontario Bank on the eve of its suspension of business, with the Bank of Montreal, whereby the latter bank undertook to assume the control of the business of the Ontario Bank, receiving a transfer of its assets and undertaking to the extent of such assets to discharge the liabilities of the Ontario Bank, that bank agreeing to pay any deficiency. It was contended that the agreement amounted to a sale of its assets by the Ontario Bank and was void because the conditions of the Bank Act, R.S.C. c. 29, ss. 99-111, had not been complied with. The Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson, Shaw, and Mersey) agreed with the courts below that the transaction did not amount to a sale, but was in the nature of a loan, and that the Bank of Montreal were entitled to prove as creditors for what appeared to be due on the footing of their accounts of the assets received, and debts discharged by them, and for their remuneration.

CONVEYANCE OF GAS LEASES AND WELLS—RESERVATION BY VENDORS OF SUFFICIENT GAS TO WORK THEIR PLANT—CONSTRUCTION BREACH—SUBSTITUTED GAS OBTAINED BY VENDORS FREE OF COST—MEASURE OF DAMAGES—NOMINAL DAMAGES.

Erie County Gas Co. v. *Carroll* (1911) A.C. 105. This was an appeal from the Court of Appeal of Ontario. The appeal

turned on the question of what was the proper measure of damages for breach of the contract in question. The plaintiffs carried on an extensive quarry, and were owners of gas wells and gas leases and gas grants which in April, 1891, they sold and assigned to one of two appellant companies, including the right to explore and drill the lands to which they related for natural gas, and set up plant and machinery for its distribution and sale. The vendors, however, reserved "enough gas to supply the plant now operated or to be operated by them on the property." In 1894 the vendees assigned their interest to the other appellant company, and shortly afterwards the assignees cut off the supply of gas to the plaintiffs, and refused further to supply them, and the plaintiffs thereupon procured the gas required for their plant, by acquiring other gas leases and rights and by construction of the necessary works. The plaintiffs sued both companies for damages for deprivation of gas contrary to the reservation. They obtained judgment in 1897 with a reference to the Master to assess the damages, but appeals were brought with varying success, and it was not until 1900 that the judgment was finally affirmed. The plaintiffs did not proceed on the reference until 1905, and the Master made his report in 1907, and it was on an order made on appeal from this report that the present appeal originated. On the reference it appeared that the plaintiffs' expenditure for procuring gas elsewhere had amounted to about $58,297.52, and that they had subsequently, pending the suit, sold their quarry and the gas works for an aggregate sum of $250,000, of which $75,000 was attributable to the gas works. In these circumstances the Judicial Committee held that the plaintiffs were only entitled to nominal damages, and the judgment of the court below for $54,031.82 was, therefore, reversed. See *British Westinghouse Co.* v. *Underground Ry. Co.* (1911) 1 K.B. 575.

HUSBAND AND WIFE—CONTRACT OF WIFE FOR HUSBAND'S BENEFIT —INDEPENDENT ADVICE—UNDUE INFLUENCE—DUTY OF HUSBAND'S SOLICITOR ACTING FOR WIFE.

Bank of Montreal v. *Stuart* (1911) A.C. 120 is an important case not only on account of the amount involved, but also for the legal questions raised therein. The action was brought by a married woman to set aside a guaranty given by her to the Bank of Montreal for the debt of her husband. The Supreme Court of Canada following its decision in *Cox* v. *Adams*, 35 S.C.R. 393,

held that the transaction was void by reason of the plaintiff not having had independent advice. The Judicial Committee of the Privy Council (Lords Macnaghten, Collins and Shaw, and Sir A. Wilson) affirmed the judgment, but on different grounds, their Lordships dissent from *Cox* v. *Adams*, so far as it affirms that no transaction between husband and wife for the husband's benefit, can be upheld unless it is shewn that the wife had independent advice: but, on the facts, they came to the conclusion that notwithstanding the plaintiff admitted that she knew what she was doing and intended to benefit her husband, yet their Lordships considered she was in fact unduly influenced to enter into the transaction, which was manifestly improvident; and her husband's solicitor having acted in the transaction, and having failed to warn her against what she was doing, it was held that the bank was affected because the husband's solicitor was also acting as solicitor for the bank, and their Lordships held that it was the duty of the solicitor in the circumstances to put before the wife plainly and explicitly the effect of what she was doing, and if she had, as she probably would have done, rejected his intervention, he ought then to have gone to the husband and insisted on the wife being separately advised; and if that was impossible, owing to the implicit confidence placed by the wife in her husband, he should have retired from the business altogether.

Correspondence

UNLICENSED CONVEYANCERS.

DEAR SIR,—Knowing your solicitude for the interests of country practitioners I venture to call your attention to the following case in the hope that you may be able to suggest a remedy.

I enclose the advertising card of a leading real estate and insurance agent of this town and samples of advertisements for creditors in Surrogate matters. This man travels about the country a great deal, and, in the course of his business, solicits people to let him draw their wills. The inducement he holds out is that it costs them only a trifle and that his long experience has qualified him to do the work as well as any lawyer.

Having possession of the will, when the testator dies he undertakes to probate it and wind up the estate. Instead of handing

over the will to a local solicitor for probate, he employs the firm in the county town whose name appears in the advertisements for creditors. He makes no secret of the fact that he does so because he is paid for it and there is no doubt that he gets a share of the solicitors' fees. A further reason may be that he thus runs less chance of losing the business of winding up the estate.

It appears to me that all this is clearly a breach of the Solicitors Act and also of Surrogate Court Rule 46, and that the solicitors are equally guilty with their principal. I may add that this man is a Commissioner for taking affidavits and is by virtue thereof an officer of the court under R.S.O. 1897, c. 74, s. 7, whatever that may amount to.

The Medical Association employs detectives and vigorously prosecutes all parties infringing the provisions of the Medical Act. Why cannot the Law Society, which takes over $26,000 annually from solicitors for certificates to practice, adopt a similar plan?

In small communities where people are closely connected by family ties and business interests it is out of the question for a local solicitor to take action. The Law Society should conduct the prosecution and furnish counsel, etc., out of its own funds. The matter is a serious one for us, as the greater part of our practice consists of the administration of the estates of deceased persons, and this man does nearly as much in this line as all the solicitors in town together.

I hope I am not presuming too much in asking you to give this matter your best consideration as it concerns the profession at large as well as ourselves.

AN OLD SUBSCRIBER.

[The above matter is referred to at length in our editorial columns.—ED. C.L.J.]

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Full Court.] [April 1.

RE GOOD AND JACOB Y. SHANTZ SON & CO. LIMITED.

Company—By-law to restrict the transfer of fully paid up shares—Refusal of directors to allow transfer—Dominion Companies Act.

Appeal by the above company from the judgment of a Divisional Court, 21 O.L.R. 153, dismissing appeal from the order of Teetzel, J., who directed the transfer of certain shares to Good. The appeal in this matter was limited, on the application for special leave, to the one general question, viz., the power of the appellants, a company incorporated under the Dominion Companies Act, R.S.O. (1886), c. 119, to restrict the transfer of fully paid up shares in the company as enacted in their by-law No. 2, clause 17; in other words, whether by virtue of their statutory powers they could pass and enforce such a by-law.

Held, that it was beyond the powers of the company as defined by the Act to prohibit the transfer of paid up shares. Appeal dismissed.

MEREDITH and MAGEE, JJ.A., dissented.

DuVernet, K.C., and *Lefroy*, K.C., for appellants. *S. Johnston*, K.C., and *W. M. Cram*, for respondents.

Full Court.] [April 25.

WADE *v.* ROCHESTER GERMAN FIRE INSURANCE CO.

Fire insurance—Statutory condition—Assignment of policy for benefit of creditors—Assignment not absolute—Policy not void.

This was an appeal by the defendants from the judgment of MIDDLETON, J., who found in favour of the plaintiffs. The sole question presented for discussion was whether an assignment

for the benefit of creditors made by a debtor pursuant to the Act respecting assignments and preferences by insolvent persons of property insured under a policy of insurance effected in Ontario falls within the fourth statutory condition so as to avoid the policy.

This condition reads as follows: "If the property insured is assigned without a written permission endorsed hereon by an agent of the company duly authorized for such purpose, the policy shall thereby become void; but this condition does not apply to any change of title by succession or by the operation of the law or by reason of death."

Held, 1. The broad principle deducible from the decisions is that unless the property is assigned so as to absolutely divest the assignor of all right, title and interest thereto and therein the condition does not take effect and that irrespective of the form of the instrument of assignment. Thus a mortgage created or a transfer to a bare trustee for the transferor are outside of the conditions and the other cases can readily be supposed to which unquestionably the condition would have no application.

2. In the present case though the assignors part with the title to the extent of passing the legal interest to the assignee they do not part with all their right and interest in it and so notwithstanding the form of the instrument the assignors retain an insurable interest in the property and the statutory condition does not come into operation. Appeal dismissed.

Hellmuth, K.C., and *G. L. Smith*, for defendants. *Rowell*, K.C., and *L. G. McCarthy*, K.C., for plaintiffs.

HIGH COURT OF JUSTICE.

Full Court.] [March 30.

JONES *v.* TORONTO AND YORK RADIAL RY. CO.

Street railway—Injury to person crossing track—Negligence —Failure to give warning—Contributory negligence—Rights of foot passengers.

Appeal by the plaintiff from the judgment of Riddell, J., dismissing the action with costs. The facts of the case were that the plaintiff, who was slightly deaf, got out of his waggon, and proceeded to cross Yonge Street on a skew (as he called it) of about 45 or 50, to the street car tracks laid on the west

side of the highway. Before crossing he looked up north and saw the defendants' car at a standstill—he says at Davisville switch, but it may have been closer, so as to be 200 feet, instead of 550, distant—whatever the distance he believed he had time to get across to the house where he was going, before the car could reach the place where he was crossing and he kept on till aroused by the impact of the car, accompanied by shouting and ringing of the gong. He had been seen and shouted to from the approaching car behind him, some 20 yards off, but though he could hear the gong he does not seem to have heard the shouts.

Held, 1. The rule of law which governs this appeal is expressed in the words of Lord Penzance, in *Radley* v. *London and North Western Ry. Co.*, 1 App. Cas. p. 759; "though the plaintiff may have been guilty of negligence and though that negligence may have contributed to the accident, yet if the defendant could, in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him." See also *G.T.R. Co.* v. *Ives*, 144 U.S.R. 429, and *Philadelphia* v. *Kleeth* (1906), 128 Fed. R. 820, where the rule is laid down that, "no one should be relieved from liability from injury inflicted by him on another, by reason of the fact that that other has negligently exposed himself to a danger, if when that situation was or ought to have been apparent to him, he omitted such reasonable precautions as would, if exercised, have avoided the accident.

2. The public have a right to cross the streets and go over the street car tracks for that purpose, and such people have an equal right to be there with the cars. A motorman, who has control of a powerful and propelling force which, if carelessly used might endanger life and limb, must look out for any one in danger or likely to be in danger, and must use a commensurate degree of care to avert such danger. If the motorman sees the exposed condition of the traveller and proceeds without giving warning or using his best endeavour to stop, this negligence is excessive and criminal.

3. In the present case the situation of danger was apparent and the neglect of the motorman to take prompt steps to avoid the collision was the final act of negligence which gives a right to recover damages in spite of the preliminary fault of the plaintiff in getting close to the tracks.

Judgment reversed and verdict to be entered for $1,200 and costs.

J. MacGregor, for plaintiff. *C. A. Moss,* for defendants.

Divisional Court.] CRONK *v.* CARMAN. [April 12.

Principal and agent—Remuneration of agent—General employment—Implied contract—Quantum meruit.

Appeal by the defendants from the judgment of the County Court of Hastings. The plaintiff, who was formerly foreman of the defendants, sued to recover $250, which he said the defendants agreed to pay him if he procured a purchaser for their printing business, whom he said he did procure, but which assertion the defendants denied. At the trial, judgment was given for the plaintiff for $250, and costs. The legal position as stated by the court was that the defendants employed the plaintiff to sell at $12,000, this he was unable to do, but he procured a purchaser for a smaller price, and they accepted this purchaser at the lower price.

Held, that there was an implied contract to remunerate. As to the amount, the most which plaintiff could recover would not necessarily be the amount named as commission upon the higher price, but he should be awarded on a quantum meruit. Appeal dismissed with costs.

C. Millar and *F. E. O'Flynn,* for defendants. *E. N. Armour,* for plaintiff.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] [April 29.

LANE *v.* DUFF.

Solicitor and client—Retainer—Scope of authority—Payment—Effect of—Successive applications—Estoppel.

Plaintiff was employed by the master and managing owner of a vessel of which defendant was part owner to act as solicitor in connection with proceedings against several seamen for desertion and also in resisting an application for their discharge from imprisonment. After the imprisonment of the seamen the master was removed from his position as managing owner and defendant, who was appointed in his stead, paid a note given by the master for plaintiff's services in securing the conviction of the men and in successfully resisting the application for their

discharge. Subsequently a second application for the discharge of the men was made before another Judge and, in the absence of the master, the papers were brought by a member of his family to plaintiff, who notified defendant and another owner of the application. Plaintiff had no notice of the removal of the master and was merely told by defendant that he had no instructions.

Held, by GRAHAM, E.J., and DRYSDALE, J., affirming the judgment of RUSSELL, J., that if defendant objected to plaintiff opposing the second application he should have told him so, and having failed to do so, and having paid the note given for services given after the removal of the master, the principle of estoppel applied.

Per SIR CHAS. TOWNSHEND, C.J., and MEAGHER, J., dissenting, that the plaintiff's retainer was at an end when he was paid for the services rendered and that he was not justified in opposing the second application without fresh authority.

O'Connor, K.C., for appeal. *Mellish*, K.C., contra.

Full Court.] [April 29.

CATHOLIC CORPORATION OF ANTIGONISH *v.* MUNICIPALITY OF THE COUNTY OF RICHMOND.

Taxation—Exemptions—Construction.

The Assessment Act, R.S.N.S. (1900), c. 73, s. 4, exempts from taxation, "every church and place of worship and the land used in connection therewith and every churchyard and burial ground."

Held, not to extend to and include lands and buildings not being churches or places of worship such as glebe houses and lands, rectories, parsonages, etc., occupied and used by the pastors in actual charge of the churches and not rented or let to third persons or used otherwise than as a means of aiding in the support of such pastors.

J. A. Wall, for plaintiff. *Mellish*, K.C., for defendant.

Full Court.] THE KING *v.* ELDERMAN. [April 29.

Municipal corporation—By-laws—Use of abusive language on street—Word "scab"—Appeal—Point not taken below—Information and conviction—Sufficiency of.

Defendant was convicted by the stipendiary magistrate of the town of Springhill, for a violation of the by-law of the town

in relation to the use on the streets of the town, of abusive, insulting and provoking language to any person thereon. The offence consisted in the use on one of the streets of the town of the words "scab," "damn scab," "born scab," and other like expressions addressed to the informant. The words were uttered at a time when a number of workmen were carrying on a strike and defendant was a sympathiser with the strikers and the informant was a workman employed by the company against whom the strike was directed.

Held, 1. Reversing the judgment of the County Court judge and restoring the conviction with costs that defendant was properly convicted.

2. A point not taken before the magistrate or the judge of the County Court is not open on the appeal.

3. The information, which set out the words used and referred to the by-law, was sufficient omitting the word "abusive" or the words "insulting and provoking."

4. It was not necessary that the by-law should be set out in the conviction.

Mellish, K.C., and *Ralston*, for the appeal. *W. B. A. Ritchie*, K.C., contra.

Province of Manitoba.

KING'S BENCH.

IN RE LONDON FENCE, LIMITED.

Winding-up company—Winding-up Act, R.S.C. 1906, *c.* 144, *s.* 131—*Contributories—Application to stay proceedings in action by liquidator against contributory—Who may make.*

1. Under section 131 of the Winding-up Act, R.S.C. 1906, c. 144, further proceedings on an issue ordered to be tried between the liquidator of a company being wound up under that Act and a person placed by him on the list of contributories as to the liability of the latter, should be stayed when it is shewn that an overwhelming proportion of both the shareholders and creditors of the company and the liquidator himself desire that the claim against the contributory should be abandoned because of their belief that the proceedings would not be of benefit to them. The order for such stay, however, should contain a pro-

vision that any shareholder or creditor who is opposed to it may use the name of the liquidator or the company in bringing the issue to trial, on giving within a time limited a satisfactory indemnity to the liquidator against costs; in default of which only the issue to be dismissed.

2. To ascertain the wishes of the shareholders and creditors, it is not necessary that there should be a meeting; their consent may be sufficiently expressed by counsel. *Re West Hartlepool,* L.R. 10 Ch. Ap. 618, followed.

3. The application for the stay may be made by a shareholder or a creditor independently of the liquidator. *Re Sarnia Oil Co.,* 14 P.R. 335, followed.

A. B. Hudson, Coyne, and *Armstrong,* for applicants. *Anderson,* K.C., for the liquidator. *Symington,* for company. *O'Connor,* contra.

Macdonald, J.] THE KING *v.* KOLOTYLA. [April 12.

Criminal law—Conviction for vagrancy—Gaming—Living by means of—Sufficiency of evidence—Habeas corpus.

The prisoner was convicted under par. (1) of s. 238 of Crim. Code for that, having no peaceable profession or calling to maintain himself by, he, for the most part, supported himself by gaming and was thereby a loose, idle and disorderly person and a vagrant. There was evidence that, although he was a carpenter by trade, he had not been working at it or any other trade for about seven months prior to his arrest, that he had been making money by taking a rake-off from men resorting to his house, who gambled there and that he had not only paid his rent for several months back, but had also repaid $25 of borrowed money during that period and had supported himself and family in some way.

Held, that the magistrate was justified in finding that the prisoner had for the most part supported himself by gaming, and that the prisoner was not entitled to be discharged upon habeas corpus. *The Queen* v. *Davidson,* 8 M.R. 325, distinguished.

P. E. Hagel, for prisoner. *Patterson,* K.C., Deputy Attorney-General, for the Crown.

Robson, J.] [April 17.

TORONTO CARPET MFG. CO. *v.* IDEAL HOUSE FURNISHERS.

Practice—Commission to take evidence of plaintiffs' chief witness abroad—Application for—Material for, sufficiency of.

A commission to take the evidence in Toronto of the plaintiffs' general manager for use at the trial should be refused when it is shewn that he would be the chief witness for the plaintiffs to meet defences denying the sale of the goods sued for and setting up that the plaintiffs had agreed to accept shares in the defendant company in satisfaction of the debt guaranteed by the individual defendants and that shares had been accordingly allotted to and accepted by the plaintiffs, and when the only material in support of the application was an affidavit of the witness saying that he was a material witness to prove the account and to disprove the various defences, and that it would entail great loss and expense for him to attend a trial at Winnipeg, as his duties as general manager of the plaintiff company required his continued presence in Toronto. *Canadian Railway Co.* v. *Kelly*, 17 M.R. 645; *Lawson* v. *Vacuum Brake Co.*, 27 Ch.D. 137, and *Ross* v. *Woodford* (1894), 1 Ch., at p. 42, followed.

Hannesson, for plaintiffs. *Armstrong, Taylor* and *Phillipps*, for various defendants.

Robson, J.] SCHWARTZ *v.* BIELSCHOWSKY. [April 17.

Joint debtors—Release of one by giving time to the other—Release by accepting separate obligation of one joint debtor.

1. Where one of two joint debtors furnished the other with money to pay his half of the debt, his position as to the balance does not become merely that of surety for the other, unless the creditor knew of the facts. *Rouse* v. *Bradford Banking Co.* (1894), 2 Ch. 32, (1894), A.C. 567, followed.

2. When the creditor expressly declares his intention to hold both the joint debtors, he may accept the separate obligation of one for an unpaid balance of the debt and give him time for payment, renewing the obligation several times, without thereby releasing the other from his liability for such balance. *Swire* v. *Redman*, 1 Q.B.D. 536; *Brease* v. *Griffith*, 24 O.R. 492, *Cluff* v. *Norris*, 19 O.L.R. 457, and *Bedford* v. *Deakin et al.*, 2 B. & Ald. 210, followed.

Hoskin, K.C., and *Montague*, for plaintiff. *Andrews*, K.C., and *F. M. Burbidge*, for McDermott. *Hannesson*, for Bielchowsky.

Robson, J.] THE KING *v.* MONVOISIN. [April 21.

Criminal law—Bail for prisoner committed to trial for murder —Justifiable homicide—Self-defence.

When the depositions taken at the preliminary hearing of a charge of murder clearly shew that the deceased died by the hand of the prisoner and are such as to justify his commitment for trial, and sufficient to establish a case to go to the jury, bail should be refused, although it also appears from the depositions that the prisoner might be able to convince the jury at the trial that his act was done in self-defence. *Rex* v. *Greenacre*, 8 C. & P. 594; *Rex* v. *Blythe*, 19 O.L.R. 386, and *Queen* v. *Mullady*, 4 P.R. 314, followed.

Bonnar, K.C., for prisoner. *Graham*, for the crown.

Province of British Columbia.

SUPREME COURT.

Gregory, J.] [May 10.

EMERSON *v.* FORD-MCCONNELL.

Libel—Damages—Verdict for five cents—Costs.

In an action for libel, whether the plaintiff recovered only five cents damages, it was held that he was entitled to costs, there being no evidence of any misconduct on his part or any reason shewn to deprive him of costs other than the smallness of the verdict.

A. D. Taylor, K.C., for plaintiff. *S. S. Taylor*, K.C., for defendant.

COURT OF APPEAL.

Full Court.] [April 10.

HOLMES *v.* LEE HO AND LON POY.

Principal and agent—Listing—Net price—Commission—Change in terms—Revocation of agency.

Plaintiff and one of the defendants, after a conversation, arranged on the selling price of a piece of real estate at $6,000. There was a conflict in the evidence as to whether that was to

be a net price, but this difficulty was got over, by the fact that on the occasion the parties next met, a few days later, the defendant in question said, "property is gone up now, and I shall want $6,000 net." Plaintiff, on the same day, the second occasion (but before the change in price), brought the property to the notice of a purchaser, and told the defendant about him, Plaintiff also changed his advertisement to read $6,500, as the selling price. The purchaser refused to pay more than the $6,000, and eventually bought direct from the owners at that price.

Held, on appeal, (affirming the finding of LAMPMAN, Co. J.), that the plaintiff's agency, if he had any, was revoked before the plaintiff had put himself in a position to claim a commission.

Tait, for plaintiff. *A. D. Crease,* for defendant.

Full Court.] ROWLANDS *v.* LANGLEY. [April 10.

Principal and agent—Sale of land—Commission—Procuring purchaser—Net price.

Plaintiff at one time obtained an option on defendant's ranch with the idea of promoting a syndicate to purchase it. In this he was unsuccessful, and then undertook the sale of the ranch on a commission basis, $100,000, being the purchase price, and his commission or profit to be made by adding $5,000 thereto. He endeavoured to effect a sale in various quarters and ultimately introduced H. to the defendant, telling the former that the price was $105,000, and taking the latter to protect him at that price. H. stayed for some days on the ranch inspecting it, and, having concluded to purchase, asked defendant his price and was told $100,000, which he paid.

Held, on appeal, affirming the verdict of the jury at the trial (GALLIHER, J.A., dissenting), that plaintiff was entitled to recover his commission of $5,000 from the defendant (vendor).

S. S. Taylor, K.C., for appellant (defendant). *Davis,* K.C., for respondent (plaintiff).

Book Reviews.

The New Code of International Law. By JEROME INTERNOSCIA, of Montreal, member of the Bar of Quebec. The International Code Company of New York, Publishers. 1910.

This is a remarkable work and from its title and from the fact that it is published in parallel columns in three different languages, English, French and Italian, it necessarily forms a very bulky volume of over one thousand pages, the size being 9 x 11½.

The object of the author is to aid in the praiseworthy effort of putting an end not only to war, but to something which he thinks it is almost as bad, ruinous peace. By this Code he desires to educate the public in a science not well known and at present of limited application, and which he claims must be thoroughly explained, both scientifically and theoretically, before any approach to the desired end could be expected.

There comes with the book, as tending to explain its origin, a pamphlet entitled "A World Treaty of Arbitration" by James L. Tryon, Ph.D., Assistant Secretary of the American Peace Society. This paper gives a sketch of what has been done at the Hague Conference and by various nations in reference to world arbitration for the pacific settlement of international disputes.

This writer points out that as a result of the movement for arbitration of late years an attempt was made at the first Hague Conference to establish a universal system of obligatory arbitration. This was, however, resisted by Germany, and arbitration, though approved of as a theory, was left on a voluntary basis. Since then a number of the nations have agreed among themselves by treaties to refer all their disputes to arbitration, but these separate treaties, made by them in pairs, would not be of much practical use in the desired direction, nor would they accomplish what might be expected from a single world treaty including all the nations. If this latter were possible, a great step would have been gained; but so long as human nature remains as it is, even that would not put an end to war, or do away with armed peace; for, as seems to be generally admitted, nothing more could be expected than that it should be left optional with the signatory powers to decide for themselves whether a given dispute involved their vital interests, honour or independence and could legally be excepted from obligatory arbitration.

Apart from all this, however, we are among those who believe that until the millenium comes there will be wars, no matter what philanthropists and statesman may say or do to prevent them; at the same time every possible effort in that direction is worthy of all encouragement.

As to the Code before us it is evidently a work which has involved an immense labour and research, and would seem to cover if not all at least the great majority of the questions, which, judging from the experience of the past, would be likely to be the occasion of disputes between nations, and which, but for peaceful arbitration, would naturally lead to the arbitrament of force. For the use of those who look forward to a time of peace as the result of these praiseworthy efforts and labours of love the digested information this Code contains would be of the greatest value in helping to put into practical concrete shape a system of international law, to be further developed and enlarged as experience might dictate.

Oswald's Contempt of Court, Committal, Attachment and Arrest Upon Civil Process. With an appendix of forms. 3rd ed. By GEORGE STUART ROBERTSON, M.A. With reference to the cases decided by the various Provincial Courts of the Dominion, the Supreme Court of Canada and the Supreme Court of the United States. By A. C. FORSTER BOULTON. London: Butterworth & Co., 16 Bell Yard; Toronto: Canada Law Book Co., Limited. Philadephia: Cromarty Law Book Co. 1911.

The fact that this edition has been revised and substantially altered by Mr. Robertson, the learned author of "Civil Proceedings by and against the Crown" is a sufficient guarantee to the profession that the work has been well and thoroughly done. He has included a chapter on attachments and committals on the Crown's side of the King's Bench Division and in bankruptcy; also a new chapter on attachments in civil proceedings by the Crown. This will add largely to the value of the work. Its usefulness, especially in this country, is largely increased by the presence of the leading cases on the various subjects decided on this side of the Atlantic collected by Mr. Boulton. These appear under the heading of "Canadian Notes" following the various chapters composing the work.

The Commercial Code of Japan. By YANG YIN HANG, graduate in law of the Waseda University, Tokyo, Japan; Master of Law, University of Pennsylvania. Boston Book Co. 1911.

The commercial code of Japan is founded mainly on the commercial code of Germany, and contains also elements from the codes of other continental countries, with, of course, some administrative provisions due to Japanese conditions. It is an interesting book to have in one's library in these days of Oriental progress.

Topham's Real Property. An introductory explanation of the law relating to land. 2nd ed. By ALFRED F. TOPHAM, LL.M. Barrister-at-law. London: Butterworth & Co., Bell Yard. 1911.

This book is intended for students, giving an outline of the law sufficient for ordinary examinations on real property. Test questions for the use of students have been prepared by F. Porter Fawcett, B.A., Barrister-at-law, which will be helpful for students in preparing for examination, giving them some idea of what they may expect on that nervous occasion.

Flotsam and Jetsam.

Mr. Mason, of New England, was cross-examining a witness who had previously testified to having heard Mr. Mason's client make a certain statement, and it was upon the evidence of that statement that the adversary's case was based. Mr. Mason led the witness round to his statement, and again it was repeated *verbatim*. Then, without warning, he walked to the stand, and pointing straight at the witness said, in his high, impassioned voice, "Let's see that paper you've got in your waistcoat pocket!" Taken completely by surprise, the witness mechanically drew a paper from the pocket indicated, and handed it to Mr. Mason. The lawyer slowly read the exact words of the witness in regard to the statement, and called attention to the fact that they were in the handwriting of the lawyer on the other side. "Mr. Mason, how under the sun did you know that paper was there?" asked a brother lawyer. "Well," replied Mr. Mason, "I thought he gave that part of his testimony just as if he had heard it, and I noticed every time he repeated it he put his hand to his waistcoat pocket, and then let it fall again."

Canada Law Journal.

VOL. XLVII. TORONTO, JUNE 1. No. 11.

JUDGMENTS AGAINST MARRIED WOMEN.

The married woman, when she comes into litigation, is a fruitful source of difficulty. She has lately been asking the Divisional Court (Mulock, C.J.Ex.D. and Teetzel and Middleton, JJ.) to adjudicate upon a question of liability in the case of *Hamilton* v. *Perry*. In this case she was party to a joint promissory note with her husband. The plaintiff as holder sued her, and her husband in a Division Court. There was nothing in the note, nor in the proceedings in the Division Court, to shew that she was a married woman. She and her husband consented to judgment which was accordingly signed against them both personally. Execution having been issued on this judgment the married woman applied to Clute, J., in Chambers for a prohibition to the Division Court which was refused; but, on appeal to the Divisional Court, the appeal was allowed and prohibition granted against enforcing the judgment as a personal judgment, but without prejudice to the plaintiff applying to the court to amend it by making it merely a proprietary judgment. This serves as another illustration of the absurdities into which the courts are driven by the ridiculous rule that a judgment against a married women is to be in the special form settled in *Scott* v. *Morley*, and other cases. On the face of the proceedings there was nothing to inform the court that the defendant was a married woman, for ought that appeared to the contrary, she might have been a feme sole; the judgment on its face was perfectly warranted by all the evidence before the court at the time it was pronounced and yet is now pronounced invalid because of the existence of a fact within the defendant's knowledge, but not disclosed to the court. The protection of married women from personal liability on their contracts is a protection which they

are entitled to claim, but if they don't choose to claim it and submit to judgment in the personal form, they have merely waived the benefit of a law which they might have set up for their protection.

According to the maxim quilibet potest renunciare juri pro se introducto a defendant may, as a rule, decline to avail himself of a defence which would be valid at law, and a sufficient answer to the plaintiff's demand, and waive his right to rely on that defence, but married women seem to be an exception to this rule. They are to have the rights of femes soles, but are nevertheless in the judicial arena to be treated as if they were infants incapable of consenting.

This case, as we have said, demonstrates the absurdity of the form of judgment judicially prescribed by the courts against married women. The statute does not require any such form, it has been spun and, as we humbly think, ill-advisedly spun, out of the judicial brain. The statute does not appear to contemplate any such special form of judgment against married women as the courts have framed. As far as the statute is concerned, the judgment should be no different in form from any other judgment. It may well be, however, when the judgment comes to be enforced by execution, questions may be raised as to what property of the married woman debtor is exigible.

Holding as the Divisional Court did, that the judge had no jurisdiction to pronounce a personal judgment, although no evidence before him warranted his pronouncing any other kind of judgment, might have the effect of rendering the officer of the court issuing an execution thereon, and the sheriff or bailiff executing it, liable in trespass, notwithstanding that the judgment on its face appeared to be perfectly regular.

We cannot help thinking that the court would have come to a wiser conclusion, if it had held the judgment in question valid, without prejudice to the married woman defendant applying to amend it, if so advised.

HAS THE RULE IN SHELLEY'S CASE BEEN REVOKED IN ONTARIO?

A curious little point was recently before a Divisional Court (The Chancellor and Latchford and Middleton, JJ.) arising on the construction of a will, whereby the testator devised and bequeathed the residue of his real and personal estate to his three children, H. J. and S., share and share alike "subject as to H.'s share, that he should hold the same as trustee of his heirs, and use the income as he may see fit." It was argued that the effect of this provision was to give H. an estate in fee under the rule in Shelley's case, but the court came to the conclusion that the rule did not apply and that H. took a life estate and his heirs a remainder in fee, because, as the court held, the effect of the devise was to vest in H. a legal estate for life, and an equitable estate in remainder for those who should be his heirs, and that these two estates being, as it was said, of different qualities the rule did not apply: because, according to Lord Herschell in *Van Grutten* v. *Foxwell* (1897), A.C. at p. 662, "It is well settled that if the estate taken by the person to whom the lands are devised for a particular estate of freehold, and the estate limited to the heirs of that person are not of the same quality—that is to say, if the one be legal and the other equitable, the rule in Shelley's case has no application." The court also thought that if the words "trustee of his heirs" were referable to persons to be ascertained in a particular way pointed out by the testator, or were used so as to embrace all the descendants of the ancestor collectively, successively and indefinitely, the rule did not apply: and reading the word "heirs" as meaning the persons who should become entitled under our statute law as heirs, the Divisional Court came to the conclusion that *Greaves* v. *Simpson*, 10 Jur. N.S. 609 and *Evans* v. *Evans* (1892), 1 Ch. 173, were authorities for holding that the rule in Shelley's case did not apply to the devise in question. The learned Chancellor, who delivered the judgment of the court described the case as inter apices juris, and it is certainly an illustration how the unlearned testator may contrive ingenious puzzles for judges.

With all due deference, we venture to offer some reasons why it appears to us that the court might have reached a different conclusion from what it did. We remark in the first place that the assumption of the Divisional Court that the estates of the tenant for life and the heirs were not of the same quality seems, having due regard to the Statute of Uses, to have been ill-founded. Notwithstanding the words of trust, the estate in remainder was a legal estate in the heirs. If the testator had possessed more technical knowledge he might have directed that H. should hold to the use of B. in trust for H.'s heirs and then the principle to which Lord Herschell refers would have prevented the rule in Shelley's case from taking effect because the life estate would then have been legal and the remainder in the heirs would have been equitable: but, in the case in hand if, as we think, both the estate of the tenant for life and the remainder to his heirs were legal estates, then there seems to be no good reason why they should not have coalesced under the rule in Shelley's case into an estate in fee; Lord Herschell himself says, immediately after the passage above quoted, "If they (i.e. the estates of the tenant for life and that of the heirs) are both legal or both equitable, the rule applies."

And with great respect to the Divisional Court, we submit that if the somewhat subtle construction which the court gave to the word "heirs" in this case in order to oust the rule is tenable, it amounts to a practical revocation of the rule altogether in Ontario. The cases which are referred to in support of that construction, however, seem plainly distinguishable. In *Greaves* v. *Simpson,* 10 Jur. N.S. 609, the limitation was to John Greaves for life and after his decease "then upon trust for the heir or heiresses at law of the said John Greaves *or his or her heirs or assigns forever,*" the words which we have italicised being held by Kindersley, V.-C., sufficient to indicate that the heirs were not to take by descent. He says: "If indeed the court was obliged to decide that the heir took by descent, then indeed the rule in Shelley's case would make it a fee simple to John Greaves, but *the superadded words prevent that.*" So in

Evans v. *Evans* (1892), 2 Ch. 173, the limitation was "to the use of A. for life," with "ultimate limitation" to the use of such person or persons as at the decease of A. shall be his heir or heirs at law, *and of the heirs and assigns of such persons*;" which, of course, is a similar limitation to that in *Greaves* v. *Simpson*, supra, and received the like construction, but in the case in hand there are no such "superadded words."

If the construction placed on the word "heirs" in *Re McAllister* is followed in Ontario, then it would appear as if in Ontario there can be no case in which the rule in Shelley's case can apply, because in any limitation in this province the word "heirs" is always open to the construction that it means not the common law heir, but the persons who are to be ascertained as heirs by reference to our statute law. On this point Lord Macnaghten in *Van Grutten* v. *Foxwell*, supra, makes this pregnant observation: "The question now in every case must be whether the expression requiring exposition be it 'heirs' or 'heirs of the body' or any other expression which may have the like meaning, is used as the designation of a particular individual or a particular class of objects, or whether, on the other hand, it includes the whole line of succession capable of inheriting." See *Van Grutten* v. *Foxwell*, supra. If the words are susceptible of the former construction the rule in Shelley's case does not apply, if on the other hand they are susceptible of the latter construction then it will apply. In the words used in the will in question *In re McAllister*, we fail to see any indication of any intention to designate any particular individual or class, on the contrary the words used seem plainly to indicate the whole line of succession capable of inheriting.

WHAT IS AN INTERLOCUTORY JUDGMENT?

This question is one which is apt to arise where it is sought to appeal to the Supreme Court of Canada. That court has no jurisdiction to entertain appeals from Ontario in common law actions from any judgment that is not final. Many curious decisions have been arrived at, as to what are and what are not final

judgments within the meaning of the statute. It seems to be a question which should be dealt with in a liberal spirit, and with a careful avoidance of technicalities. The evident object of the statute is to give an appeal from any adjudication that finally disposes of the action, or, we should think, any substantial and not merely subsidiary question in the action. In the case of *Clarke* v. *Goodall*, noted ante, p. 305, the point came up and the conclusion reached does not appear to us to be satisfactory. In that case, at the trial of the action a reference was ordered to a referee to assess the damages and further directions were reserved. The Master assessed the damages and an appeal was had from him to a Judge, and from the Judge, to a Divisional Court, and from the Divisional Court to the Court of Appeal. On a motion in that case for a judgment on further directions, it is obvious the decision of the Court of Appeal could not be impugned and the High Court would be bound to give judgment for the damages as finally assessed by the Court of Appeal. As regards the assessments of damages, which is really the substantial question in the action, it is perfectly plain, therefore, that the judgment of the Court of Appeal is a final judgment, as far as the Courts of Ontario are concerned; and in reality disposes of the main and principal question in the action, and yet the Supreme Court has reached the conclusion that this is not a "final judgment" within the Supreme Court Act. In *Smith* v. *Davies*, 54 L.T. 478, a judgment of foreclosure was held to be a "final judgment," though no final order had been pronounced. In *Collins* v. *Paddington*, 5 Q.B.D. 368, an order made on a case stated by an arbitrator was held to be interlocutory; but in *Sherbrook* v. *Tufnell*, 9 Q.B.D. 621, such an order was held to be "final." The Supreme Court has decided that no appeal lies from an order refusing to set aside a judgment by default: *O'Donohue* v. *Bourne*, 27 S.C.R. 654; nor from an order perpetually staying proceedings: *Maritime Bank* v. *Stewart*, 20 S.C.R. 105; nor from a judgment on a specially indorsed writ: *Morris* v. *London and Canadian L. and A. Co.*, 19 S.C.R. 434. On the other hand an order refusing a motion to set aside a judgment

by default was held by a Divisional Court of Ontario to be final and therefore appealable: *Voight* v. *Orth*, 5 O.L.R. 443.

In the latter case the Court regarded the substantial effect of the order, and, as we think, reached the proper conclusion, that though in one sense the order might be considered to be interlocutory, it was really and substantially a final order as regards the merits of the action. It has been said that it would be a hopeless task to attempt to reconcile the various decisions as to what are "final" and what are "interlocutory" judgments or orders. The only sure rule seems to be one of common sense; does, or does not, the order or judgment in question, finally dispose of the action or some substantial question therein? If it does then it should be regarded as a "final" order, and as such appealable, and if it does not then it should be held to be interlocutory. It is perfectly clear that no appeal could be successfully brought in the *Goodall* case from a judgment on further directions, because the judgment of the Court would be based on the report of the Referee as varied by the Court of Appeal, and until the order of the latter Court is reversed there can be no question that a judgment based thereon would be unimpeachable.

If the Supreme Court's decision is correct it is obvious that it may have a very wide reaching effect, and may be the means of shutting out litigants from any appeal whatsoever to the Supreme Court, in most important cases involving enormous amounts, and it would seem that some amendment of the Supreme Court Act is needed.

JUDICIAL APPOINTMENTS.

In discussing the appointment of justices of the peace, the English *Law Times* makes the following remarks: "Lord Loreburn is to be congratulated upon having sternly resisted all political pressure to equalize the politics of the magisterial Bench, and we, in common with the rest of the profession, are fully satisfied that in making these inferior judicial appoint-

ments, as in the case of his appointments to the High Court and County Court Benches, he has striven to obtain the best possible men for the posts. This ideal has not always been adhered to in the past, but it is merely stating an obvious fact, that if the high standard of our judiciary, whether in the High Court, County Court, or petty sessions, is to be maintained, the appointments must be made entirely free from any political, or denominational considerations, and that the sole qualification for judicial office must be the fitness of the candidate himself. If high character and competency are considered as the only reasons for preferment, the composition of our judiciary will be beyond criticism."

If all this be a correct view of the matter of judicial appointments in England, as we think it is, it is certain that the same principles are equally applicable in Canada and each of the provinces; and it is to be hoped that the present and all future ministers charged with the responsible duty of advising as to judicial appointments will act upon then.

In the past, men have been appointed to high judicial office in Ontario for no better reason than that they happened to be of a particular stripe of politics, or of some particular religion. It is, of course, desirable that a judge should be a religious man, but in the administration of the law, neither politics nor religion of a particular stripe are necessary qualifications for the Bench, and men who are appointed for political or religious considerations may be apt to think that they are on the Bench in order to give effect to their political or religious convictions, rather than to administer justice free from all bias, whether political or religious. We had recently a so-called religious paper finding fault with a deceased judge, eminent both for his integrity and impartiality, and who did justice, loved mercy, and walked humbly before his God, because, forsooth, he had not been more subservient to the church through whose influence it was said he had been appointed to the Bench.

IMPLIED WARRANTY OF AUTHORITY.

The more one considers the judgment of the Court of Appeal in *Yonge* v. *Toynbee* (1910), 1 K.B. 215, and *Simmons* v. *Liberal Opinion, Limited, In re Dunn*, 46 L.J. 135; the more one realizes the important and far-reaching effects of the principle laid down in *Collen* v. *Wright*, 27 L.J. Q.B. 215, which may be shortly stated as follows:—Where an agent in good faith assumes an authority which he does not possess, and induces another to deal with him in the belief that he has the authority which he assumes, he makes himself personally liable for the damages sustained by such other as the result of his so dealing. In the leading case an action was brought against the executors of A., who had signed an agreement, describing himself as the agent of B., to grant to the plaintiff a lease of a farm belonging to B. Both the plaintiff and A. believed at the time that A. had authority from B. to make the agreement, but A. had not, in fact, that authority. B. having refused to grant the lease, the plaintiff sued him for specific performance, but the suit failed because A. had no authority from B. Upon these facts it was held that the plaintiff was entitled to recover from A.'s executors as damages, the costs of the suit in equity, which was held to have been properly brought, as being damages naturally resulting from A.'s implied misrepresentation. Mr. Justice Willes in giving judgment said: "I am of opinion that a person who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorised to act as such agent is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion of the authority being untrue. The obligation arising in such a case is well expressed by saying that a person professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract, upon the faith of the professed agent being duly authorised, that the authority which he professes to have does in point of fact exist."

If, of course, the agent knew at the time that he had no authority, he would render himself liable in an action of deceit to the person who suffered damage in consequence of acting on such misrepresentation. (*Polhill* v. *Walter*, 1 L.J.K.B. 92.)

The principle laid down in *Collen* v. *Wright* has been repeatedly followed in cases too numerous to mention, and seems reasonable enough, but of recent years it has been extended in such an alarming manner that one feels compelled to ask "when is it going to stop?" The liability was, by the decision in the leading case, applicable to cases in which a contract was brought about by the innocent assumption of a non-existent authority, but more recent cases have extended the liability to every transaction, contracted or otherwise, brought about by such an assumption. Thus, in *Fairbank* v. *Humphreys*, 18 Q.B.D. 54, by an agreement made between a company and a contractor engaged under a contract in carrying out works for the company, it was agreed, that in consideration that the contractor would proceed with the works, the company would issue to him, in discharge of a debt then due to him under the contract, debenture stock of the company. Certificates of debenture stock were thereupon signed by two of the directors and issued to the contractor. The company had, at the time, exhausted its power of issuing debenture stock, but the directors were ignorant of the fact. Held, in an action by the contractor against the directors for breach of an implied warranty that they had power to issue valid debenture stock, that the directors were liable, and that the damages were the nominal value of the debenture stock purported to be issued. "The rule to be deduced," said Lord Esher, M.R., "is that when a person by asserting that he has the authority of the principal induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is personally liable for the damage that has occurred."

Again, in *Oliver* v. *Bank of England* (1902), 1 Ch. 610, affirmed by the House of Lords sub nom. *Starkey* v. *Bank of England* (1903), A.C. 114, a stockbroker applied to the Bank of England for a power of attorney for the sale of consols, believing himself to be instructed by the stockholder, and bonâ fide induced the bank to transfer the consols to a purchaser upon a power of attorney to which the stockholder's signature was forged. *Held,* that the broker must be taken to have given an implied warranty that he had authority, and that he was therefore liable to indemnify the bank against the claim of the stockholder for restitution. It was argued in this case that the rule in *Collen* v. *Wright* did not extend to cases where the agent did not know he had no authority and had not the means of finding out, but this was rejected, and it was also laid down that the rule is in no way affected by *Derry* v. *Peek,* 14 App. Cas. 337, and applies not only to contracts but also to any business transaction into which a third party is induced to enter by a representation that the person with whom he is doing business has the authority of some other person.

In *Sheffield Corporation* v. *Barclay* (1905), A.C. 392, a banker in good faith sent to a corporation a transfer of corporation stock which subsequently proved to be a forgery. It was held by the House of Lords that both parties having acted bonâ fide and without negligence, the banker was bound to indemnify the corporation against their liability to the person whose name had been forged, upon the ground that there was an implied contract that the transfer was genuine. This was considered by Lord Davey to be the result of the decision in *Oliver* v. *Bank of England* (1902), 1 Ch. 610.

Then we get the case of *Yonge* v. *Toynbee,* decided last year, and reported (1910), 1 K.B. 215, which we thought would be regarded as the high-water mark in the extension of the doctrine. Before the commencement of the action in question, the defendant had instructed a firm of solicitors to act for him, and had subsequently become of unsound mind. After the issue of the writ the solicitors, not knowing that the defendant had be-

come insane, and acting on the original instructions, entered an appearance for the defendant, and pleadings were delivered, and various interlocutory proceedings took place. After notice of trial had been given, the solicitors for the first time discovered that the defendant had become of unsound mind, and informed the plaintiff. The latter took out a summons for an order that the appearance and all subsequent proceedings should be struck out and that the solicitors should pay the plaintiff's costs. The Court of Appeal held that the plaintiffs were entitled to such costs on the ground that a person who professes to act as an agent, impliedly contracts that he has authority and is liable for a breach of that implied contract, even though the facts are that he originally had authority but that his authority has come to an end (the lunacy, of course, determined the authority) by reason of facts of which he has no knowledge or means of knowledge.—This is truly a startling decision, and one which affects solicitors not a little. It will be necessary for them in future to get express instructions periodically, apparently, throughout the course of an action, to make sure that their authority has not been in any way determined, otherwise they may find themselves landed in costs. Nay, further, may we not say that, strictly speaking, to be absolutely safe the solicitor should, when receiving instructions, stipulate for a medical examination of his client in order to be quite certain of the latter's sanity!

The old case of *Smout* v. *Ilbery*, 12 L.J. Ex. 357, which was followed as recently as 1900 in *Salton* v. *New Beeston Cycle Co.*, (1900), 1 Ch. 43, has long been considered as an authority for the proposition that when a principal gives an agent a continuing authority to make contracts for him, and the agent continues to act after the revocation of the authority but without knowledge of its revocation, the agent incurs no liability towards any person with whom he has made any such contract. This cannot now be considered good law. In fact Buckley, L.J., in his judgment sums up the law as follows:—"The liability of the person who professes to act as agent arises (a) if he has been

fraudulent, (b) if he has without fraud untruly represented that he had authority when he had not, and (c) also when he innocently misrepresents that he has authority when the fact is either (1) that he never had authority, or (2) that his original authority has determined by reason of facts of which he has not knowledge or means of knowledge."

Lastly, in the recent case of *Simmons* v. *Liberal Opinion, Ltd.*, damages for libel to the tune of 5,000l. were awarded to the plaintiff. At the trial it appeared that the defendants were not registered either under the Industrial and Provident Societies Act, 1893, or under the Companies Act, and in fact had no legal entity. An application was made for an order that the plaintiff's costs should be paid by the solicitor for the defence on the ground that he, by entering appearance and conducting the defence, impliedly warranted that he had a client, whereas, as a matter of fact, he had no client recognized by the law. The solicitor, giving evidence, stated that he had been properly instructed by responsible persons interested in "Liberal Opinion," and that he assumed that he was acting for a duly registered company, and did not become aware that such was not the case until the trial. Mr. Justice Darling declined to make the order, but the matter has since been brought before the Court of Appeal, and they have reversed the decision in the court below, relying on the above-mentioned case of *Yonge* v. *Toynbee*. The contention that the solicitor had some persons as clients for whom he was authorized to act was brushed aside on the ground that, if such was the case, appearance should have been entered in the action in their own names, instead of in the name under which they carried on business, as required by Ord. XLVIIIa. r. 5.

Thus a new terror is added to the already onerous liabilities and duties of solicitors. Our readers will forgive us for writing at this length, but we feel that the principle involved is one of extreme importance to the legal profession, and the result of these far-reaching decisions must be fully realised. We cer-

tainly think that the implied warranty of authority theory has been carried too far in the two last decisions of the Court of Appeal; let us hope that it will not be extended any further.—*Law Notes.*

QUAINT LAW.

One of the most interesting of law books is the Scotch classic "Regiam Majestatem." It is well described in a sub-title, as "Auld Lawes and Constitutions of Scotland. Faithfullie collected furth of the Register, and other auld authentick Bukes, fra the Dayes of King Malcolme the Second, untill the Time of King James the First, of gude Memorie; and trewlie corrected in Sundry Faults and Errours, committed be ignorant Writers, And translated out of Latine in Scottish Language, to the Use and Knawledge of all the Subjects, within this Realme; with one large Table, Be Sir John Skene of Curriehill. Quereto are ajoined, Twa Treatises." Editions in 1609 and in 1774, quarto.

The preface, beginning, "It is certaine and manifest to all wise men, that there is na thing mair necessar, or profitable to all kindomes, common-wealthes, cities, and to all assemblies of people leivand together in ane societie; then godlie and gude lawes, knowen to the people, swa that they can pretend na ignorance thereof;" goes on to say, that the "subtill cautellis, . . . quha were called kirkmen" had "caused all the lawes to be conceaved, formed and published in the Latine tongue . . . to continew the people in ignorance, quhilk is ane great pillar of their kingdom;" but that James the Saxt had commanded "the auld lawes to be sighted, corrected, and collected in ane buke."

Skene quotes certain enacting clauses to prove the laws "authentick," and concludes "Quhat I have done, I remit to thy judgment and censure. I have travelled meikill, ane long time . . . I am the first that ever travelled in this water, and therefore am subject to the reprehension of many quha sall follow after me, quhom I request maist friendly to take in gude parte all my doings."

The Regiam Majestatem is one of the books about which controversies have raged. Regarded as genuine by many, it is denounced by others as spurious. It has been held that Glanville was copied from the Regiam Majestatem. It has also been held that the Regiam was copied from Glanville, in a cunning attempt to Anglicise the Scottish law. Whichever way belief tends, the inherent interest of the volume is sure.

A sample of the law in Regiam Majestatem is this Chapter *Of Pactions*. "Paction is the consent of twa persons or moe anent the giving and receiving of ane thing. (2) Ane paction is nocht quhen ane consent is given anent ane thing quhilk is trew, or quhilk is false: for, gif twa or more persons consent to this false proposition, William is an oxe; or to this true proposition, William is ane man; sic consent is nocht ane paction, non anie way obligatour; for neither of the parties is oblissed to other be sic ane consent. (3) And quhere I said that paction is the consent of twa or moe persons, thereby paction is different fra pollicitation, quhilk is ane hecht or promise of ane person onely. (4) Paction is driven and hes the name fra *pax* and *actus* (that is, from ane action or deid of peace) for they quha makes pactions haveand divers opinions and contrarious motions of minds, after divers and many strifes and contentions, peaceablie convenes and agries in ane constant will and uniforme sentence. (5) Or, paction is driven fra percussion, or striking together of hands; for in auld times, in contracting of obligations, the use was to shaik hands, in signe and taken that faith and trueth sould be keiped by the makers of the paction."

"Item, There is twa kinds of pactions, some are profitable (lawful) and others are unprofitabill (unlawful).

"(2) Profitabill are they, quhilk are not unprofitabill."

After this somewhat obvious statement, subsequent paragraphs are mainly devoted to unprofitabill pactions, ending with "Ane paction quhilk is filthie, or is impossibill, is in no waies obligatour."

"We decerne and ordeine all pactions to be keiped, quhilks are nocht to the detriment or hurt of the saull."—*Legal Bibliography.*

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

WILL—CONSTRUCTION—BEQUEST OF ARREARS OF RENT—ACCRUING RENT—APPORTIONMENT—NET OR GROSS RENTS.

In re Ford, Meyers and Molesworth (1911) 1 Ch. 455. A tenant for life of settled estate by her will bequeathed to the person who on her death should become entitled to the possession of the estates "all arrears of rent in respect of the same estates which shall then be due me." The testatrix died on the 4th March, the rents were payable quarterly, but by the custom of the estate they were collected half-yearly on 29th September and 25th March. The questions Eady, J., was called on to decide were, what rents passed by the bequest and whether it carried the gross rents, or merely the net rents, after deductions for outgoings, and collection, and he held that the bequest carried not only all rents unpaid at the preceding 29th September but also the rents which fell due at Christmas, and a proportionate part of those which had accrued since Christmas and up to the death of the testatrix; and that the legatee was entitled to the gross rents without any deductions.

MORTGAGOR AND MORTGAGEE—TENDER BY MORTGAGOR—DUTY OF MORTGAGEE ON TENDER BY MORTGAGOR—RE-CONVEYANCE—REDEMPTION—COSTS OF ACTION.

Rourke v. *Robinson* (1911) 1 Ch. 480. This was an action by a mortgagor for redemption. He had given notice to the mortgagee of his intention to pay off the mortgage, and at the appointed time had tendered the full amount due and demanded the execution of a re-conveyance indorsed on the mortgage which had previously been settled between the parties, but the mortgagee's solicitor refused to get his client to execute the re-conveyance until after the money had been actually paid over, consequently when the money was tendered the re-conveyance was not ready to be delivered and the mortgagor then refused to pay the money, and brought the present action for redemption, and Warrington, J., held that the defendant was bound contemporaneously with the tender of the money to hand over the re-conveyance, and the title deeds in his possession, and that therefore he was liable for the costs of the action, and that he was not entitled to any interest or costs subsequent to the date of the tender.

HUSBAND AND WIFE—MORTGAGE OF WIFE'S PROPERTY BY HUSBAND AND WIFE—PAYMENT OF MORTGAGE MONEY TO HUSBAND AND WIFE—PRESUMPTION—SURETYSHIP—EXONERATION OF WIFE'S PROPERTY.

In *Hall* v. *Hall* (1911) 1 Ch. 487, the plaintiffs as the representatives of a deceased married woman, whose estate had been mortgaged by herself and her husband, claimed that it was so mortgaged as surety for her husband, and was entitled to be exonerated by his estate from the mortgage debt. The mortgage in question had been made in 1859 and 1880 and the receipts for the mortgage money were signed by both husband and wife, and Warrington, J., held that a payment to husband and wife is prima facie a payment to the husband, but that by way of rebuttal it may be shewn that the money was in fact paid to the wife in such a way as to become her separate property, or that it was applied by her husband for her benefit. In the absence of such proof he held that the plaintiffs were entitled to the relief claimed.

STATUTE OF LIMITATIONS (21 JAC. 1. C. 16)—(10 EDW. VII. C. 34, S. 49 ONT.)—ACTION BY CESTUI QUE TRUST TO RECOVER TRUST FUND FROM PERSON TO WHOM IT HAS BEEN ERRONEOUSLY PAID—PAYMENT BY TRUSTEE TO WRONG PERSON—MISTAKE OF FACT—MONEY DEMAND—LAPSE OF TIME.

In re Robinson, McLaren v. *Public Trustee* (1911) 1 Ch. 502. This was an action by a cestui que trust to recover from the defendant, as representative of a deceased person, certain moneys which had, by mistake of fact on the part of the plaintiffs' trustee, been paid to the deceased instead of to the plaintiff. The payments extended from 1886 to 1900; the defendant relied on the Statute of Limitations as a defence to the claim, and for the defendant it was argued that the action was a mere money demand for money had and received; and the plaintiff contended that by receipt of the money the deceased had became trustee thereof for the plaintiff and that lapse of time was no bar. The trustee was not a party to the action, and Warrington, J., who tried it, came to the conclusion that although if the trust estate had been before the court it might adjust the accounts so that if there were assets to which the deceased person was entitled which the court could deal with so as to recoup the plaintiff thereout, that might be done, yet in the present proceed-

ing it was a mere money demand which the court, by analogy to the Statute of Limitations, would hold to be barred by the lapse of six years. The action therefore failed.

VENDOR AND PURCHASER—UNDERGROUND WATER COURSE—LATENT DEFECT—COMPENSATION—SPECIFIC PERFORMANCE.

Shepherd v. *Croft* (1911) 1 Ch. 521 was an action by vendors for specific performance of a contract for the purchase of land. The property was offered for sale as a residential property, and as having advantages as a building site. Beneath the property a natural stream had been carried underground in a culvert, the existence of which was not brought to the attention of the purchaser. Parker, J., held that this was a latent defect, but inasmuch as it did not so affect the property as to prevent the defendant from substantially getting what she had contracted to buy, it was a matter for compensation, and he found that in order to make the property suitable for building it would involve an expense of £600 to divert the watercourse, and he therefore granted specific performance, but subject to compensation which he fixed at £600.

TRADE UNION—ACTION TO RESTRAIN EXPULSION OF MEMBER—ILLEGAL ASSOCIATION—RESTRAINT OF TRADE—JURISDICTION—ENFORCING "AGREEMENT FOR APPLICATION OF FUNDS TO PROVIDE BENEFITS FOR MEMBERS"—TRADE UNION ACT, 1871 (34-35 VICT. C. 31) SS. 3, 4—(R.S.C. C. 125, S. 4).

Osborne v. *Amalgamated Society of Railway Servants* (1911) 1 Ch. 540. This was an action by the member of a trade union to restrain the union from expelling the plaintiff from membership, on the ground that the resolution of expulsion was ultra vires and void. The defendants took the preliminary objection that under the Trade Union Act, section 4 (3) (R.S.C. c. 125, s. 4) the court had no jurisdiction to entertain the action. By the rules of the society the executive committee had power to expel a member found guilty of attempting to injure the society or to break it up otherwise than as allowed by the rules. The plaintiff alleged that in consequence of the action of *Osborne* v. *Amalgamated Society of Railway Servants* (1910) A.C. 87, wherein he had succeeded in establishing that the society could not legally make levies on its members for political and parliamentary purposes, the defendants had wrongfully

expelled him from the society. Warrington, J., who tried the action, came to the conclusion that the society was in restraint of trade and illegal at common law, and therefore under the Act the action would not lie, which he therefore dismissed on the preliminary objection, but the Court of Appeal (Cozens-Hardy, M.R., and Moulton, and Buckley, L.JJ.), on examination of the constitution and rules of the society came to the conclusion that there was nothing illegal or contrary to public policy therein; neither was the action one to enforce an agreement for the application of the funds of the society "to provide benefits for members." The appeal of the plaintiff was therefore allowed and the action ordered to proceed to trial in the usual way.

PUBLIC NUISANCE—SPECIAL DAMAGE—OBSTRUCTION OF VIEW—PECUNIARY LOSS.

Campbell v. *Paddington* (1911) 1 K.B. 869. This was an action brought by the plaintiff to recover damages against a municipal body for erecting a stand in the street so as to obstruct the view from the plaintiff's house of the funeral procession of His late Majesty King Edward; whereby the plaintiff lost the opportunity of letting seats in the plaintiff's house to view the procession. The stand was erected pursuant to a resolution of the municipal council; but a Divisional Court (Avory and Lush, JJ.) held it to be a nuisance, and that the plaintiff was entitled to recover the special damage she had thereby sustained.

JUSTICE OF THE PEACE—SUMMONS—ABSENCE OF SEAL—DEFECT IN FORM—SUMMARY JURISDICTION ACT, 1848 (11 & 12 VICT. C. 43, S. 1—(CR. CODE, 753).

The King v. *Garrett-Pegge* (1911) 1 K.B. 880. In this case an information had been laid before a justice of the peace charging a person with an offence under the Summary Jurisdiction Acts; the justice issued a summons without a seal. On its return the accused appeared and objected to the sufficiency of the summons owing to the absence of a seal. The objection was overruled and the accused was convicted. On a motion to quash the conviction, it was held by a Divisional Court (Lord Alverstone, C.J., and Hamilton and Avory, JJ.) that if the absence of a seal was a defect, it was a defect in form within the meaning of the Summary Convictions Act, 1848, c. 1, (Cr. Code, s. 753) and that, notwithstanding it, the conviction was good.

BANKRUPTCY—STATUTORY ASSIGNEE—NOTICE—PRIORITIES.

In re Anderson (1911) 1 K.B. 896. This was a conflict between two statutory assignees as to the ownership of a fund. The facts were that in 1898 a debtor had been adjudicated bankrupt in New Zealand, being at that time entitled to a reversionary interest in personalty in England which was not discovered by the New Zealand trustee in bankruptcy. In 1904 the debtor was also adjudicated a bankrupt in England and the English trustee in bankruptcy having discovered the fund gave notice of his title to the trustees of it, and he claimed by virtue of such notice to have acquired priority over the New Zealand assignee; but Phillimore, J., held that a statutory assignee cannot by first giving notice of his title to the trustees of a fund, acquire priority over prior assignees for value, nor over a prior statutory assignee. The New Zealand trustee was therefore held to be entitled to the fund.

LANDLORD AND TENANT—LESSEES COVENANT TO REPAIR—"KEEP IN THOROUGH REPAIR AND GOOD CONDITION"—OLD BUILDING —NATURAL DECAY—DANGEROUS STRUCTURE—REBUILDING.

In *Lurcott* v. *Wakely* (1911) 1 K.B. 905 the action was brought by the assignee of a reversion against the assignee of a lease to recover damages for breach of a covenant by the lessee to keep the demised premises in repair and good condition. The demised premises consisted of a dwelling house, the front wall of which had become so dilapidated as to become dangerous and the owners and occupiers were served with notice by the municipal authority to take it down. The defendant refused to comply with this notice, and thereupon the plaintiff took down the wall and rebuilt it, and now claimed from the defendant the expense of so doing, as damages for breach of the covenant to repair. The action was referred to a referee who found in favour of the plaintiffs, and his judgment was affirmed by a Divisional Court (Darling and Bucknill, JJ.) and the judgment of that court was affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.). The contention of the defendant that his covenant did not extend to the renewal of the wall because it had become defective by old age, relying on the judgment of Tindall, C.J., in *Guthridge* v. *Munyard,* 1 Moo. & Ry. 334, 7 C. & P. 129, was held to be untenable, and Cozens-Hardy, M.R., points out the discrepancy between the

two reports of the case, and while it is conceded that a covenant to repair might not involve a liability to renew the whole subject matter if it fell simultaneously into decay, yet it does involve renewal of subsidiary parts which from time to time wear out or fall into decay.

TRADE DESCRIPTION—IMPROPER APPLICATION OF TRADE DESCRIPTION TO GOODS—BOTTLES BEARING TRADE DESCRIPTION—USE OF BOTTLES FOR SALE OF GOODS NOT OF DESCRIPTION EMBOSSED ON BOTTLES—TRADES MARKS ACT, 1887 (50-51 VICT. c. 28, s. 5 (1, 2)—(R.S.C. c. 71, ss. 5, 21, 22).

Stone v. *Burn* (1911) 1 K.B. 927 was a prosecution for breach of the Trades Mark Act. The defendant was a bottler of beer and had used the bottles embossed with the name of the Felinfoel Brewery for bottling Bass & Co.'s beer. He placed on the bottles labels shewing that it was Bass & Co.'s beer. He was convicted of the offence, and on appeal to a Divisional Court (Lord Alverstone, C.J., and Pickford and Coleridge, JJ.), the conviction was sustained. It may perhaps be a question whether the same conclusion could be reached under R.S.C. c. 71, s. 21, which makes an intent to deceive an ingredient of the offence. Under the English Act the offence is complete by enclosing goods in a package which has on it a trade description not answering to the contents, even though there be no intent to deceive.

SALE OF GOODS—C.I.F. CONTRACT—"TERMS, NET CASH"—RIGHT TO INSPECT GOODS BEFORE PAYMENT—PAYMENT ON PRODUCTION OF SHIPPING DOCUMENTS.

Biddell v. *E. C. Horst & Co.* (1911) 1 K.B. 934. In this case the Court of Appeal (Williams, Farwell and Kennedy, L.JJ.), have reversed the judgment of Hamilton, J., (1911) 1 K.B. 214 (noted ante, p. 185), and hold that on a c.i.f. contract "terms net cash," the vendee is entitled to inspect the goods before paying the price. Kennedy, L.J., however dissented; he thought the c.i.f. contract imported an obligation on the part of the vendee to pay on production of the documents of title; and that to hold otherwise would be imposing on the vendor the duty of delivering the goods to the vendee before he can demand payment, which he thought would be contrary to the decision of the Court of Appeal in *Parker* v. *Schuller*, 17 Times L.R. 299. The majority of the Court, however, considered that there was no

usage or custom which had given to a c.i.f. contract the meaning that the vendee was bound to pay the price on production of the documents before seeing the goods.

CRIMINAL LAW—CONSENT OF ATTORNEY-GENERAL TO PROSECUTION—ABSENCE OF CONSENT—NO SUBSTANTIAL MISCARRIAGE OF JUSTICE.

The King v. *Bates* (1911) 1 K.B. 964. This was a prosecution under the Explosive Substances Act, 1883, which requires that the consent of the Attorney-General so be obtained to the preferring of an indictment under the Act. The required consent had not been obtained, but the defendant had been convicted, and on appeal from the conviction the Court of Criminal Appeal (Lord Alverstone, C.J., and Lawrance and Pickford, JJ.), quashed the conviction on the ground that, in the absence of the consent, the court had no jurisdiction and that it was impossible for the court to treat the absence of the consent as involving no substantial miscarriage of justice.

SOLICITOR—PERSONAL LIABILITY OF SOLICITOR FOR COSTS—COSTS—APPEARANCE ENTERED FOR NON-EXISTING PARTY—WARRANTY BY SOLICITOR OF HIS AUTHORITY.

Simmons v. *Liberal Opinion* (1911) 1 K.B. 966. This was an action for libel published by a newspaper called *St George's and Wapping Progressive Champion*, purporting to be published by "Liberal Opinion, Limited," named as defendant. An appearance was entered for "Liberal Opinion, Limited" by a solicitor, and a statement of defence put in and affidavit of documents sworn by a person who described himself as managing director of the defendant company. The plaintiffs subsequently searched in the proper office, and found that no such company was in existence of the name of the defendant company, and informed the solicitor who had acted for the defendant, and asked for explanation, to which he impertinently replied that they had better continue their search. The case went to trial and a verdict was given for the plaintiff for £5,000 but it was then definitely ascertained that there was in fact no such company, and in consequence thereof all the proceedings were futile. The plaintiffs then applied to Darling, J., for an order to compel the solicitor who had purported to act for the defendant, personally to pay the costs which had been thus thrown away: he refused the application; but the Court of Appeal

(Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.), reversed his order, and held that the solicitor must be deemed to have warranted his authority to act for the client for whom he purported to appear.

SOLICITOR—BILL OF COSTS—DELIVERY OF BILL—ONE MONTH BEFORE ACTION—BILL SENT BY POST—SOLICITORS ACT, 1843 (6-7 VICT. C. 73), S. 37—(R.S.O. C. 174, S. 34).

Browne v. *Black* (1911) 1 K.B. 975. This was an action by a solicitor to recover the amount of his bill of costs. The defendant set up that the bill had not been delivered a month before action. The bill had been delivered by post on the afternoon of February 15, which in the ordinary course was delivered to the defendant on the 16th February. The action was commenced on the 16th March. The common serjeant, who tried the action, held that a calendar month must elapse from the date when the defendant would in the ordinary course, receive the bill when sent by post; and consequently, that the action was prematurely brought; and a Divisional Court (Ridley and Channell, JJ.), upheld his decision.

WORKMEN'S COMPENSATION ACT—OMISSION TO GIVE NOTICE—EXCUSE FOR NOT GIVING NOTICE—IGNORANCE OF ACT—LIMITATION OF ACTION.

Roles v. *Pascall* (1911) 1 K.B. 982. This was an action under the English Workmen's Compensation Act, 1906. The plaintiff had omitted to give notice of the accident, and no claim for compensation was made until the lapse of eleven months after the injury complained of was sustained. The plaintiff excused the want of notice and the failure to make a claim within the prescribed time, on the ground of his ignorance of the existence of the Act. The English Act provides that the failure to give notice is not to be a bar if the employer is not prejudiced, and the failure to make a claim within the prescribed time is not to be a bar to the maintenance of an action if it is found that the failure was occasioned "by mistake, absence from the United Kingdom, or other reasonable cause." The County Court judge who tried the action held that the omission to give notice did not prejudice the defendants, and he gave judgment in favour of the plaintiff. The Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.), however, held that ignorance of the Act was not "mistake" within the meaning of the Act, and did not excuse the omission to make a claim within the time prescribed. The action therefore failed.

Correspondence

APPEALS TO SUPREME COURT—INTERLOCUTORY JUDGMENTS.

To the Editor, CANADA LAW JOURNAL:

DEAR SIR,—On reading your note of the judgment in *Clarke* v. *Goodall* (ante, p. 305), it occurs to me that this decision is much more far-reaching than it would seem to be on its surface. The application was apparently to affirm the jurisdiction on an appeal from the Court of Appeal for Ontario, which finally disposed, so far as the Ontario courts were concerned, of the question of damages which the trial judge had referred to a referee, further directions being reserved.

The holding of the Supreme Court appears to be that because further directions were reserved, the judgment sought to be appealed from was not a final judgment within the meaning of the Supreme Court Act. Since then the matter has, as I am informed, gone to a single judge on further directions and judgment entered in accordance with the judgment of the Court of Appeal; and an application to a judge of the Supreme Court in Chambers for leave to appeal to that court per saltum has been refused because of the fact that the question of practice as to whether or not the questions which were before the referee could or could not be raised upon an appeal from the order on further directions is new and could be better dealt with by the Ontario courts. Does this mean that the result of the holding of the Supreme Court is that there cannot be an appeal to that court in probably ninety-nine per cent. of the cases in which further directions are reserved?

Under the facts stated a condition of things has arisen to which the attention of the profession should be drawn. Perhaps you would give them the benefit of your views on the subject.

SUBSCRIBER.

[The above matter is referred to at length in our editorial columns.—ED., C.L.J.]

REPORTS AND NOTES OF CASES.

England.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Lords Macnaghten and Robson
and Sir Arthur Wilson.] [March 28.

BARNETT *v.* GRAND TRUNK RY. CO.

Railway company—Negligence—Liability for injury to trespasser.

This was an appeal from a judgment of the Court of Appeal for Ontario affirming the judgment of the Divisional Court refusing to set aside the verdict for the plaintiff in an action brought against the company to recover damages for personal injuries, caused by the negligence of the company's servants. The case was tried before Meredith, C.J., and a jury who gave a verdict for the plaintiff for $600 damages, but the learned judge at the trial entered judgment for the defendants.

The respondent, who was not a passenger, nor a servant of the company, in contravention of the regulations of the company, got on to the platform of a car in an empty train of another railway company, which, in pursuance of an arrangement between the companies, was being shunted over the line of the defendant company. He had no permission or license so to use the car, and did so in order to get a lift along the line on his way home. There was evidence that he had done the same thing on other occasions. The car on which he was, came into collision with a train of the appellant company, in consequence of the negligence of those in charge of that train, whereby he was seriously injured.

Held, 1. The defendants were not liable for the injury so caused. The plaintiff was a trespasser and although the company was under a duty to the plaintiff not to wilfully injure him, they were not liable to him for mere negligence and the accident was due to the negligence of the company's servant and not to any wilful act.

2. A person trespassing does so at his own risk and a railway company is not liable to such a person on their line for injury caused to him by the negligence of their servants.

J. F. Faulds, and *P. H. Bartlett* (of the Ontario Bar) for the plaintiffs (respondents). *McCarthy,* K.C., and *E. F. Spence* (of the Ontario Bar), for the defendants (appellants).

Lords Macnaghten and Robson
and Sir Arthur Wilson.] [March 28.

GREYVENSTEYN *v.* HATTINGH.

Land—Adjoining owners—Right of protection—Extraordinary misfortune—Causing damage to adjoining lands.

This was an appeal from the Supreme Court of the Colony of the Cape of Good Hope, affirming a judgment of the Divisional Court in favour of the defendant. The parties were farmers in the district of Maltino. The defendant endeavoured to drive a swarm of locusts which were moving from the plaintiff's land away from his own land and so caused them to remain on the plaintiff's land, thereby causing damage.

Held, 1. The defendant was not liable for the damage caused to the plaintiff's crops.

2. The owner or occupier of land has a right to repel any extraordinary misfortune coming to him from the land of another though the effect may be to transfer the mischief to his neighbour's premises.

Holman Gregory, K.C., and *E. Beaumont,* for plaintiff. *Sir Robert Finlay,* K.C., and *E. Charles,* for defendant.

Province of Ontario.

COUNTY COURT, LEEDS AND GRENVILLE.

Reynolds, JJ.] [May 4.

LAYNG AND TRUESDELL.

Ditches and Watercourses Act—Outlet and injuring liability.

Held, 1. Under the Ditches and Watercourses Act the engineer has power to assess for "outlet liability" and "injuring liability."

2. A landowner within the one hundred and fifty rod limit whose land does not touch the stream being improved, but

who by artificial means concentrates and discharges a substantial body of water across an intervening owner's land (with such owner's consent and assistance) into the stream and thus materially increases the body of water to be got rid of, is liable to be assessed under the D. & W. Act.

H. A. Stewart, K.C., for appellant. *W. A. Lewis*, for respondent.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] GIFFORD *v.* CALKIN. [April 29.

Foreign judgment—Enforcement of—Jurisdiction of foreign court—Implication as to.

A foreign judgment, even regularly obtained according to the practice and procedure of the foreign country, in order to create that duty or obligation to pay which English courts will enforce, must come within one or the other of the five cases mentioned in *Emanuel* v. *Symon* (1908), 1 K.B. 309.

An agreement to submit to the jurisdiction of the courts of the foreign country is not to be implied from the making of a promissory note payable in the foreign country.

A foreign judgment does not in Nova Scotia by reason of O. 35, R. 38 stand on a different footing from foreign judgments sought to be enforced in England.

That rule was merely intended to give to a defendant another defence to an action on a foreign judgment and was not intended to regulate or alter the law of the country as to when a foreign judgment can be enforced.

Milner, for appellant. *Mellish*, K.C., and *O'Connor*, K.C., for respondents.

Full Court.] [April 29.

THE ATTORNEY-GENERAL *v.* LANDRY ET AL.

Schools and school districts—Property acquired for public purposes—Enforcement of trust—Joinder of Attorney-General—Unincorporated religious body—Deeds to and from—Ineffective to pass title.

The ratepayers of school section 8 in the County of Richmond raised a sum of money to be applied inter alia, to providing a place of residence for members of a religious order then

teaching in the section, so long as they should remain in the section, and in the event of their leaving, to become the property of the section. The defendant L., who was a member of the committee appointed to carry out the purpose of the ratepayers, purchased a property with the funds placed in his hands, and executed a deed in fee simple of it to the Mother of the Order, who, some months after, when the Order decided to leave the province, reconveyed the property to L., who mortgaged it to his brother. The Order was not incorporated in Nova Scotia, and the mortgagee had knowledge of the purpose for which and the circumstances under which the property was acquired.

Held, affirming the judgment of Longley, J., and dismissing defendants' appeal with costs:

1. The deed being made to a religious order not incorporated in Nova Scotia was a nullity and no title passed under it.

2. The same defect would affect the title of defendant under the deed to him and the mortgage to his brother who was aware of the facts.

3. The action by the Attorney-General, on the relation of one of the ratepayers, to recover for the section property which rightfully belonged to it would not be affected by a resolution of the majority of the ratepayers instructing discontinuance of the proceedings for the recovery of the property.

4. The property having been obtained by public subscription for the use of the ratepayers of the section, for educational purposes, was a charitable trust for the enforcement of which the Attorney-General was properly made a party, and was property which it was the duty of the trustees to take possession of under the provisions of R.S.N.S. c. 52, s. 55, sub-s. (a), and as to which they were guilty of a breach of trust in abandoning the proceedings for its retention.

W. B. A. Ritchie, K.C., for appellant. J. A. Wall, for respondent.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] SNIDER *v.* WEBSTER. [May 4.

Vendor and purchaser—Damages for breach of covenant to convey land—Vendor's lien.

Appeal from judgment of Robson, J., note ante, p. 154, dismissed with costs.

Full Court.] THORDARSON *v.* AKIN. [May 4.

Survey of land—New survey—Error in survey.

Appeal from decision of Prendergast, J., noted vol. 46, p. 670, dismissed with costs.

The court held that the plaintiff had failed, because he had not shewn that a careful and exhaustive search had been made for the original posts or monuments shewing the sub-division survey, and that no vestige of these could be found, it being only in such case that the plan of an equal distribution of the excess in frontage over all the lots in the sub-division should be adopted. *Barry* v. *Desrosiers*, 9 W.L.R. 633, doubted.

A. B. Hudson and *Garland*, for plaintiff. *Bergman*, for defendant.

Full Court.] [May 5.

WINNIPEG *v.* TORONTO GENERAL TRUSTS CORP.

Municipality—Compensation for land injuriously affected by exercise of municipal powers—Limitation of time for making claim—Winnipeg Charter, ss. 708, 775.

Appeal from judgment of Macdonald, J., noted ante, p. 115, dismissed with costs on the ground that the claim of the defendants had been expressly recognized by a by-law of the council passed under sub-section (*c*1) of s. 708, as re-enacted by s. 15 of c. 64 of 3 & 4 Edw. VII, and that s. 775, requiring claims under s. 774 to be made within one year, had no application, under the circumstances, to the claim of the defendants for compensation for their land injuriously affected by the exercise of the powers referred to, and that the defendants had all the time allowed them by the general law applicable to the case for making their claim.

T. A. Hunt and *Curlle*, for the plaintiffs. *Wilson*, K.C., *Hoskin*, K.C., and *McKercher*, for the several defendants.

Full Court.] CITY OF WINNIPEG *v.* BROCK. [May 4.

Municipality—By-law taking effect on the happening of some contingent event—Meaning of "passage of the by-law"—Winnipeg Charter, s. 708, *sub-s.* (*c*1) *as amended by* 3 *&* 4 *Edward VII. c.* 64, *s.* 15*—Uncertainty in by-laws—Delegation of powers of council.*

Appeal from judgment of Mathers, C.J., noted ante, p. 113, allowed with costs and the action dismissed with costs.

Held, 1. The council could only determine by a by-law what persons or classes of persons were injuriously affected by the closing of the streets and this could not be done by a by-law which, in its terms, is not to come into force until the happening of a contingent event which may never happen, and such persons could not appeal from such determination until after the by-law was brought into force by a second by-law, because they could not be injuriously affected by the passage of a by-law which might never come into force.

2. The expression "within ten days after the passage of the by-law," occurring in sub-s. (*c*1) of s. 708 of the Winnipeg Charter, as re-enacted by s. 15 of c. 64 of 3 & 4 Edw. VII., when used in a by-law which, in its terms, provided that it was not to come into force until the execution of an agreement between the railway company and the city and the due ratification of same by the council, should, under the circumstances of this case, be construed to mean within ten days after the coming into force of the by-law, because the literal construction would work a manifest injustice by arbitrarily depriving persons injuriously affected of all remedies. *Attorney-General* v. *Lockwood*, 9 M. & W. 398; *Becker* v. *Smith*, 2 M. & W. at p. 195; and *Schneider* v. *Hussey*, 1 Pac. Rep. 343, followed. *Ex parte Rashleigh*, 2 Ch. D. 9, distinguished.

3. The defendants, therefore, came in time when they brought their appeal within ten days after the passage of the by-law bringing the by-law in question into force.

Per RICHARDS, J.A.:—A by-law, which in its terms provided that it should only come into force on the execution by a railway company of a certain agreement with the city, is bad for uncertainty and because of its delegation by the council of part of their powers to the railway company. *Re Cloutier*, 11 M.R. 220, followed.

Clarke, K.C., and *Wilson*, K.C., for plaintiff. *Aikins*, K.C., for defendant.

Full Court.] MUTCHENBACKER *v.* DOMINION BANK. [May 5.

Contract—Construction of—Scope and effect of words "deemed to be"—Sale and transfer of right to cut timber—Priority as between unpaid vendor and bank holding security from purchaser on logs cut—Bills of Sale and Chattel Mortgage Act—Bank Act, ss. 88, 89*—Vendor's lien on goods—Cancellation of contract, effect of.*

By the agreement in question, the plaintiffs sold to one Mc-

Cutcheon their interest in a certain timber berth for $19,000, payable by instalments. It made use of language implying the transfer of the property in the logs as soon as cut, but contained this proviso, "That in each and every year during the currency of this agreement all logs, lumber, laths, timber, etc., shall be deemed to be the property of the (vendors) unless and until the (purchaser) shall have paid all arrears of principal and interest which may be due hereunder and the (purchaser) hereby covenants with the (vendors) not to sell, assign or transfer any such logs, lumber, timber, etc., until all arrears due as of such date are fully paid and satisfied." Pursuant to another clause in the agreement, the plaintiffs on 4th February, 1908, gave notice terminating the agreement, and forfeiting McCutcheon's payments previously made, for default in payment of the instalment due on 1st January, 1908. The logs in question had been cut before that date and were removed from the limit by McCutcheon's assignees, who on 31st March, 1908, gave the defendants a security under section 88 of the Bank Act for advances.

Held, 1. The effect of the agreement was to vest the property in the logs in the purchaser as soon as cut, subject to a right of the plaintiffs, on default in any payment, to deal with the logs as if the property therein had become re-vested in them, and that the words "shall be deemed to be" were not equivalent to "shall be" when taken along with the rest of the document. *Reg.* v. *Norfolk County Council*, 60 L.J.Q.B. 379, followed.

2. The logs in question having been in the possession and ownership of McCutcheon's assignees until 1st May, 1908, when the plaintiff first attempted to take possession of them, the Bills of Sale and Chattel Mortgage Act prevented the plaintiffs from acquiring any title to them by virtue of the agreement as against the claim of the defendants.

3. The claim of the bank was valid under sub-section 2 of section 89 of the Bank Act as against any lien of the unpaid vendors, it being proved that the bank had no knowledge of any such lien at the time when the security was taken.

4. The plaintiffs had, in fact, under the circumstances, no vendor's lien in the logs in question after they had been removed from the limit.

5. As the clause in the agreement providing for cancellation of it made no mention of any logs, the consequence of the cancellation was that the logs cut prior to that time remained the property of McCutcheon's assignees wholly unaffected by the cancellation.

A. B. Hudson and *Craig*, for plaintiffs. *Munson*, K.C., and *Haffner*, for defendants.

Full Court.] THE KING *v.* SHARPE. [May 10.

Criminal law—Summary trial of indictable offence—Assault occasioning actual bodily harm—Jurisdiction of police magistrate.

Although a police magistrate, who is not one of those officials to whom power is given by sub-s. 2 of 777 of Crim. Code as amended in 1909, to try summarily offences which might, in Ontario, be tried at a Court of General Sessions of the Peace, has power under par. (*c*) of s. 773, to try summarily a charge of unlawfully wounding or inflicting grievous bodily harm, an offence which is indictable under s. 274, yet he has no power to try summarily a charge of assault occasioning actual bodily harm, as that offence, made indictable by s. 295, although of a similar and less serious nature, is not one of those specified in s. 773.

Hoskin, K.C., for defendant. *Patterson*, K.C., for the Crown. *A. B. Hudson*, for the private prosecutor.

Full Court.] [May 22.

PARKS *v.* CANADIAN NORTHERN RY. CO.

Railway company—Liability for animals killed on track—Fences—Negligence.

Appeal from decision of Mathers, C.J., noted vol. 46, p. 749, dismissed with costs.

Full Court.] [May 22.

ANDERSON *v.* CANADIAN NORTHERN RY. CO.

Negligence—Master and servant—Injury to employee caused by negligence of fellow employee intrusted with superintendence—Liability of employer at common law—Workmen's Compensation for Injuries Act—Railway Act, R.S.C. 1906 *—Limitation of actions.*

The plaintiff''s claim was for injuries sustained by the explosion of some dynamite while he was thawing it for use in blasting out hard pan in a gravel pit under the superintendence of one Campbell, a roadmaster in defendant's employ. In an-

swer to questions, the jury at the trial found that the plaintiff was ignorant of the material he was using, that Campbell had not given him proper instructions, that the injury had been caused by the negligence of the defendant company, that such negligence consisted in not employing a competent person to superintend the work and in not furnishing proper appliances and storage for explosives, and that the defendant company had not used reasonable and proper care and caution in the selection of the person to superintend the work.

Held, HOWELL, C.J.M., dissenting, that the evidence at most shewed that, on the occasion in question, Campbell might have been negligent in his superintendence of the work, that there was no proof of his incompetency otherwise, or that the defendants had been negligent in appointing him, or in furnishing proper appliances, the onus of proving which was on the plaintiff, and, therefore, the plaintiff could not recover at common law, but was entitled under the Workmen's Compensation for Injuries Act, R.S.M. 1902, c. 178, s. 3, to the amount alternatively fixed by the jury under section 6 of that Act.

Smith v. *Howard,* 22 L.T.N.S. 130; *Young* v. *Hoffman* (1907), 2 K.B. 650, and *Cribb* v. *Kynoch* (1907), 2 K.B. 548, followed.

Wilson v. *Merry,* L.R. 1 H.L. Sc. 332, distinguished.

Per HOWELL, C.J.M.:—There was evidence to submit to the jury on all the questions answered by them and the verdict for damages at common law should not be disturbed.

Held, also, by all the judges, that the damages had not been "sustained by reason of the construction or operation of the railway," and therefore the plaintiff was not barred by section 306 of the Railway Act, R.S.C. 1906, c. 37, from bringing his action after the lapse of one year.

Macneil and *Deacon,* for plaintiff. *Clark,* K.C., for defendants.

Full Court.] THE KING *v.* RITCHIE. [May 23.

Liquor licenses—Construction of statute—Local option—Conveyance of liquor between points in territory under local option.

The prohibition of carrying or conveying "liquor from *any point in the province* to any point in any territory under a local option by-law except the same is consigned to a licensee

therein," enacted by section 32 of chapter 26 of 7 & 8 Edw. VII. in amendment of the Liquor License Act, R.S.M. 1902, c. 101, applies equally whether the point *from* which the liquor is conveyed is within or without the local option territory.

Andrews, K.C., for defendant. *Graham*, for the Crown.

KING'S BENCH.

Robson, J.]. [April 27.

RE TOWN TOPICS COMPANY, LIMITED.

Company—Appointment of inspector to investigate affairs of company—Objects for which appointment made—Mismanagement of company—Winding-up company.

The object of s. 81 added to the Manitoba Joint Stock Companies Act, R.S.M. 1902, c. 30, by 4 & 5 Edw. VII. c. 5, providing for the appointment by a judge, if he deems it necessary, of an inspector to examine and report on the affairs of a joint stock company incorporated under the Act, on the application of shareholders, is simply that facts and circumstances not otherwise open may be disclosed to those concerned. *In re Grosvenor Hotel Co.*, 76 L.T. 337, followed.

A judge, therefore, should not make such an order unless it is made to appear that there is reason on substantial grounds to believe that material information regarding the affairs or management of the company is being concealed or withheld from shareholders, whose interests entitle them to the disclosure, and it is not sufficient to adduce facts tending to shew mismanagement by the directors.

The only course open to shareholders complaining of the management, who cannot change it, is to apply for a winding-up: *In re Sailing Ship "Kentmere" Company*, W.N. 1897, p. 58.

Fullerton, for applicants. *Manahan*, for company.

Metcalfe, J.] [April 29.

GOLD MEDAL FURNITURE CO. *v.* STEPHENSON.

Guaranty—Joint guarantors—Husband and wife—Undue influence—Liability for remaining guarantors when one declared not to be bound—Principal and agent—Warranty of authority of agent—Oral evidence to explain signature of document—Right of contribution between co-sureties—Estoppel—Construction of contract.

Held, 1. When a married woman disputes her liability to a creditor of her husband upon a guaranty signed by her at his request, the onus is upon her to prove that the husband had exerted an overpowering influence upon her to induce her to sign it and that the guaranty was an immoderate and irrational act on her part. *Nedby* v. *Nedby,* 5 De G. & Sm. 377, and *Bank of Montreal* v. *Stewart* (1911), A.C., at p. 137, followed.

2. Such onus is satisfied by evidence that the wife, without questioning her husband, signed any and all documents brought to her by him without any knowledge of their contents or of their nature or purport, simply because the husband asked her to sign, and that the document was one which transferred a large portion of her property and the signing was of no material benefit to her or her husband. *Turnbull* v. *Duval* (1902), A.C. 429, and *Chaplin* v. *Brammall* (1908), 1 K.B. 233, followed.

3. The rule of law that, when one of several joint or joint and several sureties is released, all are released, is based on the principle that the creditor must do nothing to affect prejudicially the right of contribution between the co-sureties, and does not apply to a case when it is by no act or default of the creditor but only by the operation of the law that the one is released; as, for example, a wife under the circumstances above outlined.

4. When the creditor supplied goods upon the strength of a guaranty signed by three persons and also by one of those three as attorney for a fourth, two of them representing to the creditor that there was a good and sufficient power of attorney from the fourth person to the person who signed her name, and it turned out that there was no such sufficient power of attorney, the two who made that representation will be liable to the creditor for a breach of warranty of authority on the principle laid down in *Collin* v. *Wright,* 8 E. & B. 647; *Fairbanks* v. *Humphries,* 18 Q.B.D., at p. 60, and *Oliver* v. *Bank of England* (1902), 1 Ch., at p. 623, and it makes no difference that the attorney did not know that the power was insufficient. *Weeks* v. *Propert,* L.R. 8 C.P. 437, followed.

The document sued on was signed (in part) as follows: "M. Stephenson, per Attorney W. Stephenson," and W. Stephenson contended that he had not signed for himself, but only as attorney for M. Stephenson his wife.

Held, that oral evidence was admissible to shew that W. S. intended the document as executed to bind both himself and

his wife, as such evidence, while explaining, in no way contradicted the writing. *Young* v. *Schuler*, 11 Q.B.D. 651, followed.

The defendant J. A. S., who was president of the debtor company, and had undertaken to get the guaranty signed so that the plaintiffs would continue to supply goods to the company, objected that, as the guaranty was not really executed by his mother, M.S., he was relieved, upon the principle that it was not the guaranty which he intended to sign.

Held, that J. A. S. was estopped from saying that his mother was not a party to the guaranty, because he had told the creditor that W. S. had a power of attorney from his mother to sign, intending that the creditor should believe the fact and act upon it, and the creditor did believe in and act upon it by supplying goods on the strength of it.

Following general words of guaranty, the document sued on contained this clause: "and in case of insolvency of the said (debtor) you may rank on the estate for your full claim and we jointly and severally agree to pay any balance."

Held, that this expression should not be construed as in any sense limiting the effect of the prior general words, or requiring the creditor to wait until the winding up of the estate by an assignee before suing for his claim.

Laird and *McArthur*, for plaintiffs. *H. A. Burbidge, Fullerton* and *Foley*, for defendants.

Province of British Columbia.

COURT OF APPEAL.

Full Court.] HEPBURN *v.* BEATTIE. [April 10.

Libel—Finding by the jury that the article complained of "did not amount to a libel"—Question of libel or no libel left entirely to the jury—No objection to the charge.

Plaintiff was in 1910 an alderman of the city of Vancouver. At a meeting of the city council, held in March, 1910, he moved a resolution calling the attention of the authorities of adjoining municipalities to proposed real estate subdivisions and asking them to look carefully into all subdivision plans submitted for their approval. He made some remarks in support of his resolu-

tion in which he referred to the undue boosting of real estate by dealers, wild cat subdivisions, hotels on mountain tops, etc. The resolution and plaintiff's remarks were published in the *News-Advertiser* newspaper and on the following day defendant wrote a letter to that paper commenting on plaintiff's remarks, and referred to plaintiff's connection with a hotel in Vancouver, the license of which had been suspended by the license commissioners, suggesting that plaintiff had used his position as alderman to secure the license and was responsible for the conduct of the hotel business. Plaintiff then took action. A trial before Clement, J., and a special jury resulted in a disagreement. On the second trial before Hunter, C.J.B.C. and a special jury, the verdict was that the article complained of "did not amount to a libel." Judgment was entered for the defendant accordingly, and plaintiff appealed. No objection was made to the charge to the jury.

Held (IRVING, J.A., dissenting), that the question of libel was for the jury and that the verdict should not be disturbed. *Sydney Post Publishing Co.* v. *Kendall* (1910), 43 S.C.R. 461, not followed.

S. S. Taylor, K.C. and *Woodworth,* for the appellant. *A. D. Taylor,* K.C., for the respondent.

Full Court.] WILSON *v.* MCCLURE. [April 10.

Action—Survival of cause of—Death of plaintiff—Injury to personal estate—Property in timber licenses applied for—Fraudulent procurement of timber licenses—Revivor.

In an action for a declaration that defendants were, trustees for the plaintiff in certain timber licenses, or in the alternative for $250,000 damages, it was alleged that the plaintiff had done all things necessary under the Land Act to obtain special timber licenses; that before he made his formal application for such licenses, the defendants applied and falsely represented to the commissioner that they had performed all the statutory requirements to entitle them to licenses for the same limits; that the plaintiff had filed a protest against defendants' application; that before the determination of such protest, or of its having been heard, the defendants fraudulently represented to the commissioner that plaintiff had not complied with the Land Act as to stating or advertising, etc., and that he had withdrawn his protest, and was willing that licenses should be granted to defend-

ants. Plaintiff died after action brought, and his executrix applied to be substituted as plaintiff.

Held, on appeal, reversing the order of Gregory, J. (MARTIN, J.A., dissenting) that the cause of action did not survive to the executrix.

Per MACDONALD, C.J.A.:—The right given to an individual by the Land Act to apply for a license to cut timber on Crown lands, though all conditions precedent to the actual grant of the license have been fulfilled, does not confer upon the applicant any legal or equitable interest in the subject matter applied for.

Harold Robertson, for defendants. *W. J. Taylor*, K.C., for respondent.

Full Court.] [April 28.

KRZUS *v.* CROW'S NEST PASS COAL COMPANY.

Statute—Construction of—Workmen's Compensation Act, 1902 *—Alien dependants residing in a foreign country.*

Appeal from the judgment of CLEMENT, J., upon a case stated submitted for his opinion by WILSON, Co.J., acting as an arbitrator under the Workmen's Compensation Act, 1902. The deceased, a workman employed by the respondent company, was killed in an accident arising out of and in the course of his employment, and the applicant applied for compensation under the Workmen's Compensation Act, 1902, on behalf of the widow, who resided at the time of the accident, and since, in Austria. The widow was not a British subject and never resided in British Columbia. WILSON, Co.J., submitted the following questions: (1) Can the applicant, who is the legal personal representative of the deceased workman, and who was a resident of the Province of British Columbia, obtain an award under the Workmen's Compensation Act, 1902, the dependant of the deceased being an alien, residing in a foreign country at the time of the accident out of which the claim for compensation arose and at the time of the death of the deceased workman and ever since? (2) Can such legal personal representative in such circumstances enforce payment to him of compensation so awarded by an action on the award? (3) Can such legal personal representative in such circumstances enforce payment of the award pursuant to section 8 of the second schedule of the Workmen's Compensation Act, 1902. CLEMENT, J., answered the first question in the affirmative, and expressed no opinion on the other two. The respondent company appealed.

Held, that, the provisions of the Workmen's Compensation Act, 1902, awarding compensation to the dependants of a deceased workman in circumstances provided for in the Act, do not apply to alien dependants of such workman resident in a foreign country.

IRVING, J.A., dissented.

Davis, K.C., for appellant. *S. S. Taylor*, K.C., for respondent.

SUPREME COURT.

Murphy, J.] [May 18.

FRENCH *v.* MUNICIPALITY OF NORTH SAANICH.

Municipal law—By-law regulating trade—Power to regulate does not include power to prohibit—Reasonableness—Intention of council in passing by-law—Object aimed at in by-law.

Held, 1. A menagerie kept within the municipal area is not a nuisance per se.

2. Where, therefore, a municipal council passed a by-law purporting to regulate the maintenance of a menagerie within the municipal bounds, but imposed such conditions as to make such maintenance virtually prohibitive, the by-law was held bad and was quashed.

3. A by-law manifestly passed in pursuance of a particular section of the Municipal Clauses Act, and aimed at regulating or governing a specific matter, cannot be supported as applying to other matters.

4. Thus, where a by-law was framed under subsection 27*a* of section 50 for regulating the keeping of wild animals in captivity, such by-law cannot be supported under other provisions of the same section dealing with public health and sanitation.

A. E. McPhillips, K.C., in support of the application. *Aikman*, for the municipality, contra.

Obituary.

ROBERT VASHON ROGERS, K.C. —WALTER READ, K.C.

The profession has recently lost from its ranks two men, whose loss will be widely regretted, Mr. Robert Vashon Rogers, K.C., and Mr. Walter Read, K.C. Mr. Rogers in his earlier years distinguished himself by giving to the study of law a humorous turn, and his books "The Law of the Road, or the Wrongs and Rights of a Traveller by Boat, by Stage, by Rail" (1875), "The Law of Medical Men" (1884) will be remembered, not only as being sound expositions of the law, but also for the jocularity with which they abound. Like many humorous men, Mr. Rogers had a somewhat melancholy cast of countenance. His life-work was done in his native city of Kingston, where he enjoyed the general respect of all classes. He was at one time a frequent contributor to this journal.

Mr. Read, son of D. B. Read, K.C., well known to the Bar of Upper Canada, will also be remembered as a cheerful soul, who, in spite of physical infirmities, fought a brave and honest fight and was generally beloved and respected by his brethren. Latterly he had been engaged in the work of revision of the statutes and his loss from the statute revision committee will be seriously felt. His illness was brief, and he passed to his rest as the result of an attack of congestion of the lungs, from which it was hoped that he was recovering. Many members of the Bench and Bar attended his funeral on Monday, the 8th May.

Flotsam and Jetsam.

Mr. Asquith's reference to the decay of duelling in his recent speech at the Mansion House in support of the peace proposals of the American Government recalls an amusing incident which took place some time ago in an Irish court. An eminent leader of the Irish Bar, who happens also to be a wit, had subjected one of the witnesses for the other side to an exceedingly severe cross-examination. When the cross-examination had concluded and the witness had resumed his seat, he immediately wrote out a challenge to counsel and threw it across the table to him. Counsel replied that this was a matter that came within the province of junior counsel, and he handed the challenge to the latter with a request that he should deal with it in the proper way. It is believed that this method of dealing with the question did not satisfy the challenger, but the duel did not take place on that occasion.—*Ex.*

Canada Law Journal.

VOL. XLVII. TORONTO, JUNE 22. No. 12.

Coronation Day

June 22, 1911

GOD SAVE KING GEORGE THE FIFTH!

ON this day, in the Abbey Church of St. Peter, Westminster, were crowned George, son of Edward the Peacemaker and grandson of Queen Victoria of glorious memory, and His Royal Consort Queen Mary.

The King and Queen being placed in their chairs of estate in the Theatre of the Abbey, the Archbishop of Canterbury speaking at the four sides of the Theatre, East, South, West, and North, in order, said:—

> "Sirs, I here present unto you King George, the undoubted King of this Realm. Wherefore, all you who are come this day to do your homage and service, are you willing to do the same?"

And the people signified their willingness and joy by loud and repeated acclamations, all with one voice crying out

"GOD SAVE KING GEORGE!"

Then the trumpets sounded.

The Archbishop standing before the Holy Table, taking the Crown therefrom, reverently put it upon the King's head, at the sight whereof the people with loud and repeated shouts cried

"GOD SAVE THE KING!"

And that shout goes round the world with joyful acclaim from loyal subjects in all parts of the vast Empire over which our King is called to rule and which he serves.

A SINGULAR SITUATION.

We again refer to the important subject brought up for discussion in the cases of *Goodall* v. *Clarke* and *Skinner* v. *Crown Life Insurance Company.*

There is at present no effective appeal to the Supreme Court of Canada in cases from the Province of Ontario when further directions are reserved. This is the practical result of two decisions recently given by that court quashing appeals though it is possible that by a circuitous practice an appeal may ultimately be had, though under difficulty and at great cost.

In both there was a judgment establishing liability and a reference to ascertain the amount.

In the former case the Referee's report, as varied by the Divisional Court and the Court of Appeal, found damages amounting to $1,765.00. An appeal to the Supreme Court from the judgment of the Court of Appeal was taken. It was quashed on the ground that there was no final judgment of the court ordering payment of that amount.

In the latter case the question of liability was appealed to the Court of Appeal which gave judgment affirming the trial judge. An appeal to the Supreme Court was quashed on the ground that the order of the Court of Appeal was interlocutory.

In the one case the liability and the amount of that liability appear to have been settled. All that was wanting was the formal order on further directions to pay it.

In the other case the defendants had in the order allowing an appeal direct from the trial judge to the Court of Appeal admitted that their liability would exceed $1,000, and had undertaken to make that admission upon the reference, if ultimately unsuccessful on the main issue. The combined effect of these two cases will render the usefulness of the Supreme Court much less real.

It ought to be possible, under any system of appeals, to have the question which is really in dispute, disposed of without forcing the parties to occupy a position fraught with difficulties of practice, full of uncertainty as to whether the real point

will be touched, and burdened with liability for unnecessary costs.

The Supreme Court has recently framed an admirable group of rules for determining in advance questions of jurisdiction. It should not be unable to lay down a satisfactory rule for deciding whether, apart from formal findings, liability really exists for an amount over $1,000.00. But necessity exists for some amendment either to its rules or to those sections of the Act respecting the court's constitution and powers which will settle such a question in a rational way. If not, parties must get the habit of appealing from the Court of Appeal to the Judicial Committee of the Privy Council where the amount involved is $4,000.00 and of staying at home in all others.

PROFESSIONAL MEN FOR LEGAL OFFICES.

The Ontario Government has fallen from grace in connection with appointments to legal and quasi-judicial offices. We had pleasure on a recent occasion (ante, page 285) in commending them for commencing a new departure by forsaking the evil practice of their predecessors of appointing laymen to positions of the character above described. It appears now, however, that Mr. Harman was not made Registrar of the Surrogate Court of the County of York, in place of a deceased baker, as expected. There has been appointed to that office a journalist (Mr. Wallis), who has had no more experience than the deceased, though being a journalist, and a very intelligent one, he necessarily knows something about most things. The position is a lucrative one and therefore an appropriate one for political necessities. Mr. Harman, however, has been given the place occupied by the late Mr. Walter Read as counsel to the Statute Revision Commission. The position of Inspector of Insurance Companies, rendered vacant by the death of Mr. Hunter, has been filled by the appointment of Mr. A. R. Boswell. Both these appointments are good ones, and the profession may perhaps think they have done well in securing even two out of the three

positions, all of which, however, should have been filled by professional men. It may be noted as anomalous that the office given to Mr. Wallis is practically a sinecure, as the work can easily be done by a clerk who has some legal training, whilst at the same time the emoluments are very considerable. On the otther hand the positions of Mr. Harman and of Mr. Boswell are ardous ones, requiring careful personal attention as well as professional knowledge, but are not nearly as lucrative as the sinecure.

MEMORIES OF A COURT WEEK IN UPPER CANADA.

Half a Century Ago.

It was the good fortune of the writer of these reminiscences to have had the honour in those days of catering to the Bench and Bar more frequently than falls to the lot of most men, being at the time proprietor of the hostel in Goderich known as the British Exchange Hotel, which gave me favourable opportunities to observe the habits and ways of the professional class.

In 1856 my experience commenced in having the first guests of the legal fraternity under my roof; Sir John Beverley Robinson, Bart., being the pioneer. Possessing a most amiable and courteous manner, with all the instincts of a gentleman of the old school, it was a pleasure to wait on him. With him also arrived his son Mr. Christopher Robinson, Q.C., a most worthy son of a most worthy sire. He was always particularly careful not to put any one to any trouble whatever, and in consequence received the very best of attention from all those whose duty it was to serve him. Henry Eccles, Q.C., of Toronto, was also of the judge's party, as portly and handsome a man as would be seen in a week's travel. Mr. D. G. Miller, of Woodstock, a prominent lawyer in those days, arrived at the same time. As the railway was not yet in existence he always drove himself up to Goderich with a pair of horses. The judge's party would take the boat to Hamilton and thence by rail to Stratford, when Forbes, the livery man, conveyed them to Goderich. Mr. H. C.

R. Becher, Q.C., of London, was also up on legal business. Of a quiet, unassuming manner, but accustomed to all the little amenities of daily life, which, by the way, he always expected to receive, he had the happy knack of soon making himself quite at home.

Mr. Jennings, a popular horseman of London, usually attended in getting the members of the Bar to their destination. After a heavy pull of forty-eight miles over mud roads to Clinton, a halt was made for refreshments, both for man and beast. At the Rattenbury House there, a most famous hostel, known far and wide, a hearty welcome was sure to meet the tired, hungry travellers. Mrs. Rattenbury's roll of spiced beef, served by her charming daughters, being a luxury never to be forgotten.

The constables of Goderich in those days went out as far as Munro's Tavern to meet the judge, all provided with long black staves, after the English custom (though not so elaborate), and escorted him into the town. The court-house being only partially built, the large room of the British Exchange was engaged for the use of the court.

The counties of Huron and Bruce being united for judicial purposes brought a large gathering of jurymen, witnesses and all others interested in court proceedings. These people came principally on horseback, or on foot, as the highways at this time of the year were almost impassable. Generally, all the hotels and taverns in the town were filled to overflowing, making accommodation difficult to obtain. I have known as many as eight in a room, who thought themselves lucky even under such conditions. An arm-chair in the bar-room was considered a luxury.

To give the readers an idea of the number of judges and prominent members of the Bar, who became my patrons for a number of years, I will dot down some of the well-known men of the day: Hon. Mr. Justice Richards, Hon. Vice-Chancellor Spragge, Hon. Vice-Chancellor Blake, Hon. Mr. Justice Thomas Moss, Hon. Mr. Justice Adam Wilson, Hon. Edward Blake, Hon. Vice-Chancellor Strong, Hon. Oliver Mowat, Hon. Mr. Justice

John Wilson, Hon. Matthew Crooks Cameron, Hon. Mr. Justice Street, Hon. Sir William Meredith, Donald Guthrie, Q.C., and others. I ask pardon for a feeling, may I say, of justifiable pride at this record.

The presiding judges in those days entertained the members of the Bar to dinner at the close of the court. These quiet and exclusive affairs never exceeded in number eight or nine guests, whilst a jug of ale and a bottle or two of sherry was the limit in that line. In cases of emergency I was greatly assisted by Williams, the barber, who was a professed waiter, wearing the lightest of soft slippers, and no matter what the conversation was, he heard nothing. Harry Reed, the crier of the court, a well-known figure during the assizes, was possessed of an excellent voice, and gave out the summons to keep order by his "Oyes, Oyes, Oyes," with an amount of authority consistent with the dignity of the occasion. Only once do I remember the court lasting over Sunday, occasioned by a very heavy docket. Money was plentiful in those days, and Bench and Bar as well as jurymen, witnesses, and litigants all seemed to have an abundance of the needful and spent it liberally.

In closing, may I be permitted to remark, that the habits of the people at the time I refer to were vastly different to what they are to-day. Social dinners of all sorts and conditions were constantly taking place. One of those most prominent was a dinner to the Governor-General, Lord Monck, of over eighty guests; a most interesting demonstration. Sheriff MacDonald brought the distinguished guest to the door with carriage and postillions, while a detachment of Huron Rifles were stationed in front of the house to do sentry duty. As soon as His Excellency had reached his room a violent ring of the bell called me upstairs. Not being accustomed to waiting on Vice-Royalty it made me feel a little nervous, but my fears were soon allayed by the Governor-General paying me some warm compliments for the manner in which I had provided for their comfort. Tendering my thanks for the honour done me, with a hasty bow, I dropped down those stairs feeling much elated at the kind reception I had received.

Another great spread was a dinner given by the town to the volunteers on their return from Sarnia, where they had been doing frontier service during the Fenian Raid days in 1866. One hundred and twenty sat down to the table, which was a most enthusiastic gathering. Mr. Detlor was mayor. This was followed shortly afterwards by a Confederation dinner of over eighty, the principal speakers being Hon. Donald MacDonald and Mr. James Dickson. Later on Sheriff Gibbons and Mr. M. C. Cameron gave me an order to prepare a dinner for the combined County and Town Council and their friends. This party was over one hundred. My instructions were to spare no expense, as they always did these affairs with a most liberal hand. A little later on the officers of the Militia entertained the officers of the two gunboats "Cherub" and "Prince Alfred." Then again I received an order to prepare a cricket match dinner for the Clinton and Goderich clubs.

This was followed shortly afterwards by a dinner given by the Bluejackets of the gunboat "Cherub" to celebrate the marriage of one of their shipmates to an English nurse brought out from England for Mrs. Huntly, the wife of the Captain commanding the ship. This was a very jolly affair, thanks to the lot of good old Naval songs, washed down by an abundance of good beer.

On five separate occasions I was requested to prepare dinners for various law students who had gone to Toronto to pass their final examinations to allow them to practice at the Bar. In this connection I will quote the history of these young men from an article I wrote several years ago entitled "Reminiscences of the Goderich Bar." It is both interesting as well as remarkable that the whole of these young graduates were elevated to the Bench. Here are their names:—Isaac F. Toms, B. L. Doyle, W. R. Squier, L. C. Moore and James T. Garrow. Probably an unparalleled record as well as an extraordinary coincidence. With reference to these law student dinners, which were always very interesting incidents being quite unique in their character, as I never heard of similar affairs in other places, the guests generally numbered about thirty, including

all the members of the Bar in town, and any others from a distance who were up upon legal matters, all the officials of the court-house and the bank managers. As the old timers, such as D. H. Lizars, Sheriff Macdonald, Henry MacDermott, M. C. Cameron, Judge Cooper, Ira Lewis, John Macara, Hugh Johnston, John Davidson, Judge Brough, W. T. Hays and J. B. Gordon, entered the dining-room, each and all were received with rousing cheers and the glad hand of welcome. As a final entertainment I was requested to prepare an induction repast to be given to the Rev. Mr. Camelon, the new Presbyterian minister appointed to St. Andrew's Church. The gravity of this spread was in strong contract with its boisterous predecessors, and proved a most welcome calm after the storm.

Goderich, Ont. J. J. WRIGHT.

THE RIGHT OF ASYLUM.

The admitted and generally recognized principles of international law have not altered the meaning or the effect of the right of asylum, that sovereign right possessed alike by civilized and uncivilized countries. The word asylum still retains its old signification of a place of safety from pursuit, and a protection to all who come within its borders. The territory of a foreign country is an asylum for refugees, political or other, but it is of course subject to the law and treaties of extradition, and to the right of expulsion, the latter, by the almost universal comity of nations, being in many cases an inherent, and in others a reserved, right which all nations claim per se as their own. The right of asylum is a necessary consequence of the inviolability of neutral territory, and we find in Latin and Greek history instances where the right was claimed and acknowledged. It is also used in international law as what, for want of a better word, may be described as the cover extended by neutral territory to belligerent fugitives.

The practice of different countries is as a rule uniform, the only difference arising when land forces as distinguished from

naval forces are concerned. For example, in the former case, a neutral state may at all times receive individuals belonging to the states that are at war with each other, and even the forces thereof, provided its position as a neutral be recognized. Hostilities on that territory cannot be resumed, and the custom is to disarm the refugee forces. In the latter case, a belligerent war vessel may undergo repair and take in such coal and provisions as she needs in a neutral port, and the latter, in not actively preventing the vessel from resuming fighting operations, does not contravene the generally accepted law of nations.

The right of asylum is an apt illustration of the rule of international law that a state is at liberty to do whatever it likes within the confines of its own territory, regardless of the opinions or wishes of other states, so long as its acts do not operate injuriously or prejudicially to their interests and rights.

The cloak of asylum equally covers emigrants and refugees and whether or not the former have broken the laws of their own country in departing from it, and whether the latter are accused of political or non-political crimes, are equally irrelevant to the exercise of the vested right each nation thereby possesses. It is the state to whom the individual applies for leave to enter its territory that alone decides as to whether that privilege shall be granted. The only apparent exception to this rule appears to be that of a person in custody. The converse is equally true that the mere possession and existence of the right invests every state with the power of refusal to receive any or all foreigners. To exercise this right indiscriminately would be to isolate the state so acting; but the exercise of the right on reasonable and probable cause, in circumstances not only warranting such a course of action, but justifying it, is, it may be conceded, more than clear. Although states are by no means in accord or in unison in the matter, it would appear that the ends of justice would be the more easily met and satisfied, if persons who have been accused of crime, and fled from their own to a foreign country, should be delivered up by the latter for trial. Although this is the more prudent course, and therefore the more

commendable, it is very doubtful if there is any legal duty incumbent on, or imposed upon, states of extraditing such criminals. Express agreements have been entered into between certain countries whereby it is therein provided that criminals shall be delivered up for certain named crimes, and under specified conditions, and these agreements are invariably acted upon by the nations who are parties thereto. It would appear that the Fugitive Offenders Act, 1881,[1] infringes the right of asylum of Oriental countries. The Aliens Act[2] is a good illustration of the power which a country has of regulating and laying down the conditions under which foreigners shall enter a country, and the penalties they incur by evading or failing to fulfil these conditions. The admission of foreigners to a particular country carries in its train the right, often exercised, of granting them the status and the privileges of subjects of the state they enter; and here again Parliament has provided for this by the Naturalization Act of 1870. But the limits of the powers of such a state are clearly defined and restricted by the fact that the state cannot impose the duties of nationality, nor divest the foreign subject of his nationality of origin. It appears to be established by authority that the house of a diplomatic agent gives no protection either to ordinary criminals or to persons accused of state crimes. Asylum to political refugees in the houses of diplomatic agents still exists in the Spanish-American republics; and in modern times the right has been recognized and acted upon in 1841, and in 1848, 1865, and 1875, in Madrid; in 1862 in Greece; in the United States in 1873; and in England in 1910. In 1862 a British ship, on the outbreak of a revolution in Greece escorted a Greek man-of-war, with the King and Queen on board, out of Greek waters, and granted them hospitality. The right of asylum is that of the state and not of the foreigner; and the latter cannot insist that protection should be extended to him as a matter of right; he can only ask that it should be conferred upon him as an act of grace, which as a matter of

1. 44 & 45 Vict. c. 69.
2. 1905, 5 Edw. VII.

fact and of custom is frequently refused. It is strange to find that the right of asylum with regard to envoys who claimed the power to grant the right within the confines of their residential quarters was not, in the opinion of Grotius, recognised by the law of nations, because he says[3] with regard to it: "Ex concessione pendet eius apud quem agit. Istud enim iuris gentium non est."

Although foreigners who thus enter a country or state in circumstances and conditions such as these are bound by the laws of the country or state they so enter, there is a class of foreigner who is not liable to the jurisdiction or amenable to the laws of such a country, and that class of foreigner is the foreigner to whom the laws of exterritoriality apply. This fiction of the law was attempted to be carried to its furthest limit in 1867, when a Russian subject named Mickilchenkorff, being guilty of an attempt to murder in the Russian embassy at Paris, and having been arrested and his prosecution commenced by the French police, the ambassador disputed their competence and claimed his extradition. The French government, however, refused to admit that the fiction of exterritoriality could be so widely extended, and that notwithstanding that at the time of the attempt the Russians had themselves invoked the aid of the local force.[4] The rule of international law as not permitting asylum in legations to either foreign criminals or political refugees has been well settled by two cases, one in 1726, and the other in 1747, both reported.[5] In the former the Spanish government forced an entrance into the British embassy at Madrid, in order to effect the arrest of the Duke of Ripperda, whose surrender had been refused; and in the latter the Swedish government endeavoured to arrest Springer, charged with treason, who had sought asylum in the British embassy at Stockholm, and the ambassador surrendered him under protest.

The High Court of Justice has, for example, subject to certain exceptions, no jurisdiction to entertain an action or other

3. Bk. II, c. 18, s. 8.
4. 1 Calvo, s. 571.
5. Martens, 1 Causes Célèbres, 174.

proceeding against any foreign sovereign;[6] any ambassador or other diplomatic agent representing a foreign sovereign and accredited to the Crown;[7] any person belonging to the suite of such ambassador or diplomatic agent.[8] The property of a foreign sovereign cannot be seized or arrested.[9] In the case of the *Duke of Brunswick* v. *King of Hanover*[10] the defendant was not only a foreign sovereign but also a British peer; and the House of Lords (Cottenham L.C., Lords Lyndhurst, Brougham, and Campbell) unanimously affirmed the decision of the Master of the Rolls (Lord Langdale) that the respondent being a foreign sovereign, coming to England, cannot be made responsible in the Courts there for acts done by him, in his sovereign character, in his own country, in virtue of his authority as a sovereign, and not as a British subject. The question remains whether the privilege of a foreign sovereign not to be sued for acts done in his private capacity, qua sovereign, continues after he has ceased, e.g. by abdication, to be a sovereign.[11] The privilege of the ambassador extends to all persons associated in the performance of the bona fide duties of an embassy or legation. Thus, a chargé d'affaires,[12] a secretary,[13] or a chorister employed in the chapel of a embassy,[14] is privileged. The incurring of debts,[15] the breach of a promise to marry,[16] the running down of an English boat by a foreign one in Dover Harbour[17]—in all these cases no

6. *Mighell* v. *Sultan of Johore*, [1894] 1 Q.B. 149, C.A.; and see *Foster* v. *Globe Venture Syndicate*, [1900] 1 Ch. 811; *The Jassy*, [1906] P. 270.

7. *Parkinson* v. *Potter* (1885), 16 Q.B.D. 152; *Taylor* v. *Best* (1854), 14 C.B. 487; 23 L.J.C.P. 89; *Magdalena Steamship Co.* v. *Martin* (1859), 2 E. & E. 94; *Musurus Bey* v. *Gadban*, [1894] 1 Q.B. 533; [1894] 2 Q.B. 352, C.A.

8. *Fisher* v. *Begrez* (1832), 2 L.J. Ex. 13; Nelson, 401; *Novello* v. *Toogood* (1823), 1 B. & C. 554, 562; *Macartney* v. *Garbutt* (1890), 24 Q. B.D. 368; *Musurus Bey* v. *Gadban*, cited supra.

9. *The Parlement Belge* (1880), 5 P. Div. 197.

10. 6 Beav. 1; 2 H.L.C. 1.

11. *The Parlement Belge*, cited supra.

12. *Taylor* v. *Best*, cited supra.

13. *Hopkins* v. *De Robeck* (1789) 3 T.R. 79.

14. *Fisher* v. *Begrez* (1832), 2 L.J. Ex. 13.

15. *Wadsworth* v. *Queen of Spain* (1851), 17 Q.B. 171.

16. *Mighell* v. *Sultan of Johore*, cited supra.

17. *Magdalena Steamship Co.* v. *Martin*, cited supra.

action lies. Similarly, an English company tried in vain to recover a call due on shares from an ambassador accredited to the Crown by a foreign state,[18] and so far is the doctrine carried that the household furniture in London even of a British subject, who is accredited to the Crown as Secretary to the Chinese Embassy, cannot be seized for the non-payment of parochial rates.[19] This case has the curious result that a British subject, in the circumstances narrated, is exempt from the local jurisdiction of his own country. The privileges and immunities of an ambassador, in relation to the state to which he is accredited, are (1) a right to inviolability of person; (2) exemption from the local criminal jurisdiction; (3) exemption from the local civil jurisdiction, which includes not being compellable to appear before the local court, even as a witness; (4) exemption from taxation. Liability for debts incurred, however, would not be avoided or evaded by, say, an ambassador from the King of Italy to the French Republic, who visited England and incurred debts here. An action in that case would certainly lie against the ambassador personally. In *Mighell* v. *Sultan of Johore*[20] the principles of law laid down were (1) that the courts of this country had no jurisdiction over an independent foreign sovereign unless he submitted to the jurisdiction, and that such submission cannot take place until the jurisdiction has been invoked; (2) that the fact of a foreign sovereign entering into a contract in this country under an assumed name, and as a private individual, did not amount to a submission to the jurisdiction; and (3) that a certificate from the Foreign Office, or Colonial Office, as the case may be, was conclusive as to the status of a foreign sovereign. It may be mentioned that an order for a stay of proceedings was made by the Divisional Court (Wills and Lawrance, JJ.) and confirmed by the Court of Appeal (Lord Esher, M.R., Lopes and Kay, L.JJ.).

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18. Compare judgment of Wills J. in *Mighell* v. *Sultan of Johore*, cited supra, at pp. 149, 153, and *Musurus Bey* v. *Gadban*, cited supra.

19. *Macartney* v. *Garbutt*, cited supra.

20. Cited supra.

The exceptions to the rule that no action can be entertained by the court against a foreign sovereign, diplomatic agent, or similar person, are two, namely, if any such, having appeared before the court voluntarily, waives his privilege and submits to the jurisdiction of the court.[21] It is, however, doubtful if submission by an ambassador to the jurisdiction of the court would be valid, because an old statute of Anne, called the Diplomatic Privileges Act,[22] "prohibits and makes null and void the issue of any writ or process against an ambassador, and not merely writs or processes in the nature of writs of execution." The other apparent exception to the rule is that the court has jurisdiction to entertain an action against a person belonging to the suite of an ambassador or diplomatic agent, if such person engages in trade.—*Law Quarterly Review.*

MASTERS AND SERVANTS.

Some of the most elementary questions of law which occur almost every day, and on which a lawyer may at any unguarded moment be asked his opinion, are the most difficult to answer. Among these we must place questions between masters and servants. Custom or actual judicial decisions have, however, determined some of them.

For instance, "by a long and well-established custom, it is settled that, in the absence of any agreement to the contrary, the hiring of domestic and menial servants is for a year and subject to determination on a month's—*i.e.*, a calendar month's—notice by either master or servant, or on payment of a month's wages by the employer": (MacDonell's Law of Master and Servant, 2nd edit., p. 138). It has been urged that a further custom should now be recognized—namely, that the contract of service can be determined on either side at the end of the first

21. See the judgment of Esher, M.R. and Lopes, L.J., in *Mighell* v. *Sultan of Johore*, cited supra, at pp. 149, 157, 160; but compare the judgment of Wright, J., in *Musurus Bey* v. *Gadban*, cited supra; *Taylor* v. *Best*, cited supra.

22. (1708) 7 Anne, c. 12.

calendar month by notice given at or before the expiration of the first fortnight. The first month, according to this point of view, is a trial month in which the parties can find out if they suit each other.

In *Moult* v. *Halliday* (77 L.T. Rep. 794; (1898), 1 Q.B. 125) the question as to the existence of this custom came before a Divisional Court, on appeal from a County Court judge who had held that no such custom as alleged existed and that the custom was unreasonable. Mr. Justice Hawkins thought that the alleged custom was reasonable, but as the County Court judge had held that there was no such custom, and he was the sole judge on questions of fact, the court could not interfere with his decision. Mr. Justice Channell agreed, and in doing so said: "A custom is what is so well known and understood that in transacting business it is unnecessary to mention it, because it is so well known that it must be taken to be incorporated in every contract, unless something to the contrary is said. . . . The question as to the existence of a custom is a question of fact, and it is necessary to prove the custom in each case, until eventually it becomes so well understood that the courts take judicial notice of it."

The time has arisen, twelve and a half years later, for the courts to take judicial notice of the custom. In *George* v. *Davies* (noted ante, p. 623) his Honour Judge Bacon took judicial notice of it, stating that he had done so in previous cases. This being a finding as to a fact, the Divisional Court, consisting of Mr. Justice Bray and Lord Coleridge, upheld the decision of the County Court judge, and henceforth this must be reckoned as an implied term of a contract for domestic service, unless the parties agree to omit it.

In *Moult* v. *Halliday* it was also alleged that there was a custom under which if the servant left at the end of the first month he (or she) was entitled to have the character with which he (or she) came handed on to the next master or mistress. Both learned judges held this to be unreasonable, so that it is not likely that judicial notice will be taken of this alleged

custom. It is believed that servants, who have been dismissed without sufficient cause and without a month's notice, often successfully claim board wages. There appears to be only one decision on this point, and that was in a case at the Liverpool Summer Assizes in 1859 (*Gordon* v. *Potter*, 1 F. & F. 644). Mr. Justice Hill, in summing up, told the jury that if the cook had been guilty of moral misconduct she would not be entitled to any wages which had not accrued due before the drunkenness, nor to any wages in advance; "but that if they thought there was not sufficient evidence of the drunkenness, they must give as damages the accruing wages up to the time when she was discharged, and a calendar month's wages in addition—without board wages—as a master had a right to discharge a servant simply by payment of a month's wages, in addition to the accruing wages up to the time of discharge." It may be argued that this is unfair to the servant, as she would have had board and lodging if she had not been wrongfully discharged, but it must be remembered that she is doing no work for her late master and might obtain a new situation in the next day or two.

According to Mr. C. M. Smith's treatise on the Law of Master and Servant (6th edit. p. 57), it is perfectly clear that if a servant wrongfully quits his master's service he forfeits all claim to any wages for the part of the current year for which he has served, and cannot claim the balance after deducting a month's proportionate part. The learned editor defends this seeming harshness, on the ground that the servant has only to give notice and pay or agree to allow the master to deduct a month's wages, and then he can leave at once if he desires to do so.—*Law Times.*

COMPENSATION OF UNFAITHFUL AGENTS.

Among the frauds of modern commercial life, which impose on the honest members of the community a serious addition to their already heavy expenses, one of the most insidious and dangerous is that of the secret discount, or rake-off, obtained by an agent in transacting the business of his principal.

Although the principle of publicly tipping servants and the higher grades of agents has not yet reached in this country the unpleasant proportions it has attained in Europe, it is to be feared that we are already in the midst of a wide-spread development of a most serious outgrowth of the tipping policy. It is well known to the Bar, as well as to business, that eager dealers are constantly resorting to the practice of giving some secret personal benefit to the representatives of others with whom they trade. The full extend of it from its very nature cannot be discovered, but in any agency case counsel will do well to probe this feature of the agency, and will be almost certain to produce surprising results. Some States have enacted statutes punishing as a misdemeanour the acceptance of a secret discount, or rebate, by an agent.[1]

These statutes, however, are seldom enforced, and are generally overlooked by the Bar. A still more effective punishment in many cases is the well-established rule founded in the soundest common sense that an unfaithful agent is not entitled to compensation for his services.

An agent is held to uberrima fides in his dealings with his principal, and if he acts adversely to his employer in any part of the transaction or omits to disclose any interest which would naturally influence his conduct in dealing with the subject of employment, it amounts to such fraud upon the principal as to forfeit any right to compensation for services.[2] "The defendant was entitled throughout the negotiations to command the personal fidelity and sound judgment of his agent to whom he had entrusted the business, uninfluenced by such an arrangement. But, after the plaintiff had placed himself in a position where according to a common experience he must be unduly affected by a regard for his individual advantage and that of

(1) See Acts of 1904, Ch. 343 of Massachusetts.

(2) *Murray* v. *Beard*, 102 N.Y. 505, 508 *Acc. Schliefbaum* v. *Rundbaken*, 81 Conn. 623, 625; *Wadsworth* v. *Adams*, 138 U.S. 380, 388; *Schaeffer* v. *Blair*, 149 U.S. 257, 257; *Williams* v. *McKinley*, 65 Fed. 4, 7, 11 (C.C. Minn., 1894; *Trice* v. *Comstock*, 121 Fed. 620, 622 (C.C.A. Mo., 1903); *Hobart* v. *Sherburne*, 66 Minn. 171, 172; *Williams* v. *McKinley*, 74 Fed. 94, 95 (C.C.A. Minn., 1896).

his associates, he assumed adverse relations to his principal. It was, therefore, correctly ruled that, if found, such conduct constituted a breach of his contract, which prevented the earning of a commission.''[3]

The general rule is well settled that a broker must act with entire good faith towards his principal, and he is bound to disclose to his principal all facts within his knowledge which are, or may be material to the matter in which he is employed, or which might influence the principal in his action and if he has failed to come up to this standard of duty he cannot recover.[4]

In *Williams* v. *McKinley*,[5] the court said: ''The law guards the fiduciary relations with jealous care. It seeks to prevent the possibility of a conflict between the duty and the personal interest of a trustee. It demands that the agent shall work with an eye single to the interest of his principal. It prohibits him from receiving any compensation but his commission and forbids him from acting adversely to his principal whether for himself or for others. It visits such a breach of duty not only with the loss of the profits he gains but with the loss of the compensation which the faithful discharge of duty would have earned. To permit the agent of a vendor to become interested as the purchaser or as the agent of a purchaser in the subject matter of the agency, inaugurates so dangerous a conflict between duty and self-interest, that the law wisely and peremptorily forbids it. An agent of a vendor who speculates in the subject matter of his agency or intentionally becomes interested in it as a purchaser, or as the agent of a purchaser violates his contract of agency, betrays his trust, forfeits his commission as agent and becomes indebted to his principal for the profit he gains by his breach of duty.[6] This is not the first time this court has been called upon to announce these principles, but the reckless disregard of them which characterizes the acts of some of the agents

(3) *Quinn* v. *Burton*, 195 Mass. 277, 281.
(4) *Veasey* v. *Carson*, 177 Mass. 117, 120; *Acc. Sullivan* v. *Tufts*, 203 Mass. 155, 157; *Woods* v. *Lowe*, 207 Mass. 1.
(5) 74 Fed. 94.
(6) Citing cases.

whose transactions are portrayed to us, admonishes us that we cannot reiterate them too often nor enforce them too rigidly. The court below placed the decree from which their appeal was taken upon these indisputable principles."

The general rule has been equally well established in England.[7] An exception has, however, been made in recent English litigation, which will in many case destroy the efficacy of the general rule as a preventive measure.

The English decisions appear to have drawn this distinction, that where the transactions are separable and it can be determined as to which of the transactions the agent has obtained a secret profit or commission, such transactions are to be separated from those in which he has dealt fairly with his principal, and that the agent will not be deprived of his commission on all such transactions.[8]

In the *Hippisley* case, Kennedy, J., said: "I feel it is difficult to lay down any definite rule upon the subject with confidence, but I would venture to suggest the following: That where the agent's remuneration is to be paid for the performance of several inseparable duties, if the agent is unfaithful in the performance of any one of those duties by reason of his receiving a secret profit in connection with it—and I here use that word 'unfaithful' as including a breach of obligation without moral turpitude—it may be that he will forfeit his remuneration, just as in certain cases a captain of a ship might be held in the Admiralty Court to forfeit his wages as a result of misconduct in any branch of his duty as a captain; but where the several duties to be performed are separable, as to my mind they are in the present case, the receipt of a secret profit in connection with one of those duties would not, in the absence of fraud, involve the loss of the remuneration which has been fairly earned in the proper discharge of the other duties."

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(7) See *Andrews* v. *Ranney* (1903), 2 K.B. 635.

(8) *Hippisley* v. *Knee Brothers*, 1 K.B. 1. The Mass. Supreme Court, on March 3, 1911, in the case of *Little* v. *Phipps*, criticised the *Hippisley* case and affirmed the general rule. 94 N.E. Rep. 260.

This was an action brought by the complainants against a firm of auctioneers who had been employed to sell certain goods for the plaintiffs, and who were to be paid a certain commission therefor together with their cash disbursements. In making their charges the auctioneers put in the full amount of the charge for certain newspaper advertisements where, as a matter of fact, the newspapers had allowed them a certain percentage as commission on such advertisements. The custom to allow such commission was established by proper evidence. The court disallowed the commissions but refused to allow the plaintiff's contention that they could recover from the defendants the total commission agreed upon for their services as auctioneers.

The more recent case of *Stubbs* v. *Slater*,[9] the lower court refused to allow a stockbroker his commission because it was shewn that he was getting another commission from another broker with whom he dealt in the course of carrying the principal's stock. The *Hippisley* case was expressly limited to cases where the agent's compensation was separable, and he could be deprived of the portion of the compensation due for the part of his conduct which was unfaithful, and yet allow him that which he had earned for the part of his conduct that was faithful. On an appeal the decision in the case was reversed on the ground that the plaintiff ought to have known from the form in which the account was rendered that the broker was getting a commission for carrying it. There is also some loose talk in this decision to the effect that the broker would be entitled to a reasonable compensation, even if he could not get the stipulated compensation.

It is hoped that the stringent rule applying to all fiduciaries will not be weakened in this way in this country, and in the only case[10] which has been found bearing upon it, though the English was not considered, the general rule was rigidly enforced. The plaintiff as broker for defendant was to sell land and have as his compensation all over $2,000. He then made a contract to

(9) (1910) 1 Ch. 195, 203, 632.

(10) *Little* v. *Phipps*, supra, was decided since the above was written.

sell it to X. for $2,100. He then represented to the defendant that all X. would pay was $2,000, and that the plaintiff ought to get some pay so the original contract was amended so as to give the plaintiff $20 in addition to all over $2,000. The defendant discovered the fraud and refused to sell through the plaintiff, but sold to X. directly, and the plaintiff sues for his commission. The court instructed the jury that the plaintiff's fraud, if established, would deprive him only of the $20 commission. This was held error. The amendment was equivalent to a new contract for a single consideration. It was indivisible. "An agent owes his principal the utmost good faith, and if he fraudulently and falsely misrepresents the situation for the purpose of increasing his compensation and securing a more advantageous contract for himself, he cannot recover anything thereon. Indeed it is quite generally held that a separation of the good consideration from that which is illegal will be attempted only in those cases where the party seeking to enforce the contract is not a wrongdoer, or where denial of the relief asked would benefit the guilty party at the expense of the innocent."[11] —*Central Law Journal.*

(11) *Braden* v. *Randles*, 128 Ia. 653, 656.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

SHIP—COLLISION—LIMITATION OF LIABILITY—MERCHANTS SHIPPING ACT, 1894 (57-58 VICT. C. 60), SS. 503, 742—BARGE.

The Mudlark (1911) P. 116. In this case it was determined by Deane, J., that a hopper barge used for dredging purposes, with a rudder, but without any means of propulsion, and which had to be towed to and from her destination, is a "ship" within the meaning of s. 741 of the Merchants Shipping Act, 1894, and her owners are entitled to the limitation of liability as mentioned in s. 503 of the Act.

COMPANY—PROSPECTUS—FACTS OMITTED TO BE STATED—REMEDY FOR OMISSION—COMPANIES ACT, 1908 (8 EDW. VII. C. 69) SS. 81, 285—(7 EDW. VII. C. 34, S. 99 (ONT.)—(R.S.C. C. 79, S. 43).

In re South of England Natural Gas Co. (1911) 1 Ch. 573. By the English Companies Act, 1908, in case there has been an offer of shares to the public such offer must be stated in any subsequent prospectus issued by the company. A prospectus had been issued omitting to mention a prior offer of shares to the public, and on the faith of this prospectus one Byrne applied for and was allotted 200 shares. He died without having paid for the shares, and his executors applied to rectify the register by striking out his name as an allottee of shares, on the ground of the abovementioned omission in the prospectus, but Eady, J., held that although the prospectus was defective, it did not entitle the applicants to a rescission of the contract to take the shares, but that their remedy was in damages against those responsible for the prospectus, following *In re Wimbledon Olympia* (1910), 1 Ch. 630 (noted ante, vol. 46, p. 448).

EXPROPRIATION OF LAND—NOTICE TO TREAT SERVED ON MORTGAGEE —POSSESSION TAKEN BY EXPROPRIATORS—INJUNCTION.

Cooke v. *London County Council* (1911) 1 Ch. 604. In this case the defendants under statutory powers required land for their purposes belonging to one Ellis on whom notice to treat was served, and who informed the defendants that the property had been mortgaged by her, but declined to disclose the names of the mortgagees. The defendants proceeded under the notice to

treat and a jury assessed the compensation, which the defendants paid into Court. Cooke, one of the mortgagees, refused to be bound by the jury's finding, and the defendants thereupon served her with notice to treat, she then brought the present action alleging that the defendants had taken possession of the land and claiming an account of what was due on her mortgage, damages for injuries to the property, and an injunction. The defendants then gave the plaintiff notice to proceed to assess the compensation payable to her under their notice to treat, and she applied for an interlocutory injunction to restrain the council from proceeding to summon a jury, or otherwise proceeding under their notice to treat; but Parker, J., before whom the motion was made, decided that even if the defendants had taken possession that fact did not preclude them from exercising their statutory right to give notice to treat, or to proceed thereon, and he therefore refused the injunction.

PRINCIPAL AND AGENT—LIMITED COMPANY EMPLOYED AS AGENT—COMPANY EMPLOYING ITS OFFICIALS—PROFITS OF OFFICIALS—SALARY AND COMMISSION.

In *Bath* v. *Standard Land Co.* (1911) 2 Ch. 618, the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.), while affirming the decision of Neville, J. (1910) 1 Ch. 408 (noted ante, p. 14), in so far as he held that the defendant company was not entitled to make any charge for keeping the accounts of the estate of which it was manager, have reversed it, in so far as he held that it could not recover from the trust estate the profit costs of its own directors employed as solicitor and auctioneer. Moulton, L.J., however, dissented. The majority of the Court of Appeal held that the directors stood in a fiduciary relation to the company, but not to the plaintiff, and that the profit costs paid to them by the company for services rendered in respect of the estate of which the company was manager might be allowed to it in its accounts. The view of Moulton, L.J., on the other hand was that where a company undertakes the administration of a trust the directors can not use their position as de facto administrators of the trust, to profit themselves or one another; and there seems to be a great deal to be said in favour of that view, as it is easy to see that great abuses might arise if not only a trust company is allowed to make a profit, but its directors also are allowed to make individual profits out of estates committed to the company for administration.

TRUSTEE—BREACH OF TRUST—LIABILITY OF LEGACY TO TRUSTEE TO MAKE GOOD HIS DEFAULT AS TO RESIDUE—ASSIGNEES OF TRUSTEE.

In re Towndrow, Gratton v. *Machen* (1911) 1 Ch. 662. By the will of a testator a specific legacy, subject only to prior interests therein, was given to the trustee of the will, but he took no interest in the residue whereof he was trustee. He settled part of the legacy while still reversionary and mortgaged the other part. Several years afterwards he misappropriated part of the residue. The legacy having fallen into possession had been paid into Court in an action for the execution of the trusts of the will. The residuary legatees now sought to attach the legacy to make good the breach of trust of the trustee in respect of the residue, and their claim was opposed by the beneficiaries under the settlement, and the mortgagee of the legacy; and Parker, J., held that the rule that a defaulting trustee cannot claim any share in the trust estate until he has made good his default did not apply to the present case because the trustee was not entitled to any share or interest in the residue, and that as the specific legacy and residue were held upon entirely distinct trusts, one fund was not liable to indemnify the other, and therefore the assignees of the legacy were entitled to it free from any lien or equity in respect of the assignor's default.

EQUITY OF REDEMPTION—ASSIGNMENT OF EQUITY OF REDEMPTION —IMPLIED OBLIGATION OF ASSIGNEE OF EQUITY OF REDEMPTION TO INDEMNIFY ASSIGNOR—EXPRESS COVENANT OF INDEMNITY —EXCLUSION OF IMPLIED INDEMNITY—CONTINGENT REVERSIONARY INTEREST.

Mills v. *United Counties Bank* (1911) 1 Ch. 669. The plaintiff in this case, was, under the will of his father entitled to a one eleventh share of the testator's real estate expectant on the death or second marriage of the testator's widow, contingently on his being alive at the date of the death or second marriage of the widow, and his share was susceptible of augmentation in the event of any other of the testator's children dying prior to the death or marriage of the widow. This interest the plaintiff mortgaged to the defendants and secondly to his father-in-law, one Mobberley. The defendants having commenced an action against the plaintiff an arrangement was come to which included the purchase by the defendants of the plaintiff's equity of redemption in the contingent reversionary interest under his

father's will, but not in anything which might accrue thereto by reason of the death of any of his brothers or sisters. The deed of assignment provided that the equity of redemption was not to merge in the defendants' mortgage, and expressly provided that the share when received was to be applied first in payment of the defendants' claim under this mortgage, and then so far as the same would extend in payment of Mobberley's mortgage and the surplus, if any, was to be the defendant's absolute property. The share of the plaintiff in his father's estate not having yet fallen into possession, and the present holders of the Mobberley mortgage having called on the plaintiff for payment thereof, the present action was instituted calling on the defendants to pay off that mortgage on the ground of an alleged implied obligation on the part of the defendants to indemnify the plaintiff against the claim under the Mobberley mortgage. Eve, J., held, however, that the action failed, first because the implied obligation on the part of an assignee of an equity of redemption to indemnify his assignor does not take effect until the latter has obtained possession, and in this case the mortgaged property was still reversionary and contingent; and secondly because he held that there being in this case an express covenant or arrangement as to the terms on which the assignment was made it precluded any implied covenant or equitable obligation.

MORTGAGE—DEFAULT BY MORTGAGOR—MORTGAGEE IN POSSESSION —TRUST TO APPLY RENTS IN PAYMENT OF MORTGAGE DEBT— SURPLUS RENTS—ACKNOWLEDGMENT OF MORTGAGOR'S TITLE —STATUTE OF LIMITATIONS, 1874 (37-38 VICT. C. 57) S. 7 —(10 EDW. VII. C. 34, S. 20 (ONT.)).

In re Metropolis and Counties P.I. Building Society (1911) 1 Ch. 698. In this case a mortgage had been made to a building society which provided that in case of default the mortgagees might enter into possession of the rents and profits and apply same in payment of the mortgage debt and pay the balance, if any, to the mortgagor, and the rules of the society provided that when a mortgage was satisfied a receipt should be indorsed on the mortgage at the expense of the mortgagor. The mortgagee having made default, the mortgagees in 1887 went into possession and received sufficient rents by the end of 1902 to satisfy the mortgage. Subsequent receipts were carried by the society to a suspense account, and it also appeared that in the annual statement of account of the society of 1909, signed by the chairman and countersigned by the secretary and sent to the Registrar

of Friendly Societies, the mortgaged property in question was included in the "properties of which the society are in possession as mortgagors." The society having been ordered to be wound up, the mortgagor claimed to be entitled to the surplus rents in the hands of the society. This claim was based on the ground that the society were trustees of the fund and therefore the Statute of Limitations 37-38 Vict. c. 57, s. 7 (see 10 Edw. VII. c. 34, s. 20 (Ont.)) did not apply. But Neville, J., held that, notwithstanding the form of the mortgage, as creating a trust, it was in fact only a mortgage and the Statute of Limitations as in the case of other mortgages began to run as against the mortgagor from the time the mortgagees went into possession in 1887, and as the plaintiffs could not recover the land, neither could they recover the surplus rents. He also said that the annual statutory accounts above referred to were not acknowledgments of the mortgagor's title. The learned Judge calls attention to the following statement in Fisher on Mortgages, 5th ed., s. 1404: "Time will not run in the case of a common mortgage until the day of redemption has arrived; for the mortgagor cannot redeem before that day: *Brown* v. *Cole*, 14 Sim. 627"; and points out that the time, according to the statute s. 7, begins to run from the time a mortgagor enters into possession, which may in some cases be before the day fixed for redemption.

Licensing Act—"Second offence."

The King v. *Justices of South Shields* (1911) 2 K.B. 1. This case is deserving of a brief notice for the fact that a judicial interpretation is given therein to the meaning of the words "second offence" in a Licensing Act. The Court of Criminal Appeal, Lord Alverstone, C.J., and Ridley, and Channell, JJ., came to the conclusion that the expression means a second or subsequent offence committed after a previous conviction and does not mean a second offence in point of time merely.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Moss, C.J.O., Garrow, Maclaren and Magee, JJ.A.] [May 8.

RE HENDERSON AND WEST NISSOURI.

School law—Right of board to intervene in support of by-law.

This was an application on behalf of the West Nissouri Continuation School Board to be allowed to intervene and be heard by counsel in support of the by-law in question in this appeal. The by-law was passed by the council of the township of West Nissouri to authorise the issue of debentures to purchase a site and erect a school-house for the above school which was established, by a by-law of the county council of the county of Middlesex. The validity of this by-law was not admitted, but was not the subject of direct attack. The application was dismissed by MIDDLETON, J., and his decision was upheld by a Divisional Court, RIDDELL, J., dissenting, and this was an appeal from that decision. Since it was lodged, there had been a change in the personnel of the township council, and there was now reason to believe that they would not support the by-law before this court.

Under the above circumstances, the court ordered that the School Board should be at liberty at its own expense to appear and be represented by counsel upon the argument of the appeal, and support the present judgment. The School Board undertook to abide by any orders as to costs to be made on the appeal.

Reference was made to the following cases: *Langtry* v. *Dumoulin*, 11 A.R. 549, 13 S.C.R. 258; *Re Ritz and New Hamburg*, 4 O.L.R. 639; *Re Billings and Township of Gloucester*, 10 U.C.R.; *Re McKinnon and Village of Caledonia*, 33 U.C.R. 507; Safford and Wheeler, Privy Council Practice, 818.

Sir George Gibbons, K.C., for the township. *J. N. McEvoy*, for the appellant, Henderson.

Mulock, C.J.Ex.D., Teetzel and Middleton, JJ.] [May 18.

NORTHERN CROWN BANK *v.* INTERNATIONAL ELECTRIC CO. LIMITED.

Promissory note payable on demand—Endorsed to plaintiffs on date when it becomes overdue—Bills of Exchange Act, sec. 182.

This was an action upon a promissory note bearing date the 28th of June, 1906, made by the defendant company payable to the order of the Electric Advertising Co., for the sum of $3,500 with interest at 5 per cent. per annum, "before and after due and until paid," and endorsed to the plaintiffs on the day of its date. The defence was that the note was without consideration, that being payable on demand it was always overdue, and therefore came into the plaintiffs' hands as overdue, and as such subject to the equities existing between the original parties.

MULOCK, C.J.:—The neat point to be determined is whether the note was overdue when the plaintiffs became holders for value. The case was tried before Meredith, C.J.C.P., who held that the note was not overdue when on the day of its date it passed into the plaintiffs' hands. I agree with the views expressed by the learned Chief Justice in his judgment. It seems to me that the language of s. 182 of the Bills of Exchange Act negatives the appellants' contention that a promissory note payable on demand becomes overdue at the instant of its coming into existence. In substance the section declares that mere delay in presentment for payment shall not cause a note payable on demand to be deemed overdue, thus implying that delay may give a demand note the character of an overdue note which it had not previously possessed. If it were always overdue such delay could not have the operation contemplated by the section. I think it is fair to interpret the section as declaring to the effect that a note payable on demand shall not, because of that circumstance, be deemed to be overdue, but that delay in its presentment may give it the character of an overdue note.

Hellmuth, K.C., and *J. R. Meredith*, for defendants. *Arnoldi*, K.C., for plaintiffs.

HIGH COURT OF JUSTICE.

Divisional Court, Chy.] [May 11.

RE MCALLISTER.

Will—Construction—"Heirs"—Rule in Shelley's case.

This was an appeal from an order of RIDDELL, J.

This case is referred to at length, ante, p. 363. The appeal was dismissed.

Armour, K.C., for appellant. *Lazier,* for executors. *J. R. Meredith,* for infants.

Mulock, C.J.Ex.D., Teetzel, J., Middleton, J.] [May 17.

HAMILTON *v.* PERRY.

Married woman—Judgment against—Form of—Division Court jurisdiction.

Appeal from order of CLUTE, J., in chambers.

The main point in this case is referred to at length, ante, p. 361. Appeal allowed.

W. J. Clark, for defendant. *King,* K.C., for plaintiff.

Riddell, J.] WILSON *v.* DEACON. [May 27.

Contract—Agency—Commission—Sale for principal.

This was an action to recover commission on the sale of some patent rights. The plaintiff was an agent for the sale of them. The defendant had invented a carpet sweeper, and employed the plaintiff to sell the patent rights, even before the patent actually issued. The plaintiff took a great deal of trouble in the matter, and at length had the arrangement put into writing as follows:—

"With regard to our conversation concerning the selling of your patent right for Great Britain, Canada, and the United States of America, I am willing to accept twenty-five per cent. of the proceeds received for the sale or sales of said patent rights for carpet sweeper. It being understood that no other agent will have any power to act in this matter without my instructions while I am acting in your behalf." Subsequently the defendant

himself effected a sale for the amount $5,500.00 and the trial judge held that the defendant acted as he had with the intention and design of preventing the plaintiff from making a commission.

Held, 1. The plaintiff was entitled to a commission in the amount of the sale.

2. Whilst the principal himself is not as a rule disentitled to sell if the sale be made in good faith and not a mere trick to defraud the agent, under the circumstances of this case an action would lie not for the commission, but for damages for breach of contract.

G. S. Gibbons, for plaintiff. *T. G. Meredith*, K.C., for defendant.

Boyd, C., Teetzel, and Latchford, JJ.] [May 27.

RE STURMER AND BEAVERTON.

Municipal corporations—Local option by-law—Motion to quash—Residence—Constructive residence—Animus revertendi—Irregularities—Laches and acquiescence—Curative provisions of sec. 204 of Municipal Act.

Appeal by the applicant Henry Sturmer from the judgment of MIDDLETON, J., on a motion to quash a local option by-law.

BOYD, C.:—"Residence" is a word of flexible import, and as said in *Naef* v. *Mutter*, 12 C.B.N.S. 816, at p. 821, has a great variety of meanings according to the subject-matter and the objects and purposes of the legislature. In a poor-law case Blackburn, J., said: "I do not like the phrase 'constructive residence': when a person is physically absent for a time, if he has an animus revertendi, his residence continues; and the question in such a case is whether he continues to be resident, or has ceased to be resident by taking up his permanent residence elsewhere": *Regina* v. *Abingdon*, L.R. 5 Q.B. 406, at p. 409.

In a franchise case, *Ford* v. *Hart*, L.R. 9 C.P. 275, it is held that there may be a constructive residence where there is no actual residence, the person claiming in this way must have the liberty of returning, and also the intention of returning whenever he pleases. In a case of like character in the same volume, Brett, J., says: "It is true that when a person keeps the dominion over his house, and goes away for an indefinite time, with the intention of returning at an indefinite time, he may be con-

sidered as inhabitant of the house while he is not bodily within the house." That case also decides that "residence" and "inhabitancy" are practically synonymous terms: *Durant* v. *Carter*, L.R. 9 C.P. 261, at p. 268. In *Beal* v. *Town Clerk of Exeter*, 20 Q.B.D. 300, at p. 301, Coleridge, L.J., says: "Constructive residence may often be easily inferred, as in the case of a barrister on circuit, or a sailor at sea, when there is no doubt of both the power and the intention to return as soon as the circuit or the voyage is over." These observations, which are quite in accord with the view of residence in our election law as defined and held by Osler, J., in the case cited by my brother Middleton, *Re Voters' List of Seymour*, 2 Ont. El. Cas. 69, are ample authority for deciding that the voter Arthur Jones whose status is attacked (assuming that it is open to attack at this stage) could well claim to be, and swear that he was at the time of the voting, resident in the municipality for one month next before the election. The vote was taken on the 2nd January, 1911; he was then the tenant of his home at Beaverton held since the 7th April, 1909, of which he had been in actual occupation by himself and his family up to the 9th December, 1910. He was in that month called off to Whitby to take the place for a short time of an injured workman, employed as he was by the railway company. This was a temporary call and he did not expect that the removal would be at the outside for more than 2 or 3 months, and so he was told by the company. The tenure or terms of his employment are not in evidence, and there is no foothold for the argument that he had not the power to return at any time without the breach of a legal obligation—if that term is to be imported from the later English cases on the exercise of the parliamentary franchise. He had removed only enough furniture to fit up two rooms at Whitby for temporary occupation with his wife and child, and had left all the rest of his belongings (and some poultry) at his home, which he had locked up, and of which he kept on paying the rent. This is a controlling feature of the case, which, to my mind, shews that his real bona fide and continuing place of residence was where he cast his ballot. He was rightly on the list and rightly voted on that list.

Held, also, that it is too late, after the matter has gone to vote on a local option question, to hark back to preliminaries of procedure with a view of picking flaws, when there is no evidence that anyone has been misled, or that anyone has not had ample opportunity and knowledge of where his vote was

to be cast. The greatest publicity is given as to the time and place of voting before the election, and everyone interested had the opportunity of doing his utmost to further or to oppose the success of this appeal to the electorate. This failure to observe the directions of the statute was no doubt an irregularity as to the taking of the poll, but it is not made to appear that it has in any sense affected the result of the election, and the curative section (204) applies to validate at this stage. Apart from the statute the doctrines of laches and acquiescence apply to protect the outcome of de facto elections, when the parties complaining have been aware of the irregularities and have concurred therein by taking part in the election: *Regina* v. *Ward*, L.R. 8 Q.B. 210, and see *Regina ex rel. Regis* v. *Cusac*, 6 P.R. 303.

J. B. Mackenzie, for appellant. *Raney*, K.C., for respondent corporation.

Middleton, J.] REX *v.* WELLS. [May 29.

(And four other Cases.)

Lord's Day Act—Sale of cigars, candies, newspapers, etc., by hotel keepers, restaurant keepers, and druggists—"Merchant or tradesman"—Exercise of ordinary calling—Works of necessity or charity.

The defendants in these cases were charged before the police magistrate of Toronto with violations of the Provincial Lord's Day Act, C.S.U.C., c. 104, and acquitted. These decisions were questioned by the Crown, and at the instance of the Attorney-General for Ontario, a stated case in each instance was submitted by the magistrate under s. 761 of the Criminal Code. These five cases all arose under the same statute, and were argued together having much in common. Counsel for the Crown based his case on the Provincial Lord's Day Act and not on the Dominion Statute of R.S.C. c. 153, s. 16.

C.S.U.C., c. 104, s. 1, reads as follows: "It is not lawful for any merchant, tradesman, artificer, mechanic, workman, labourer or other person whatsoever on the Lord's Day to sell or publicly shew forth or expose or offer for sale or to purchase any goods, chattels or other personal property or any real estate whatsoever, or to do or exercise any worldly labour, business or work of his ordinary calling (conveying travellers or Her Majesty's mail by land or water,

selling drugs and medicines and other works of necessity, and works of charity, only excepted)."

Held, 1. Hotel keepers and restaurant keepers exercising their legitimate calling are not merchants and tradesmen within the above enactment. See also *Palmer* v. *Snow* (1900), 1 Q.B. 725, where it was held that a barber was not within the Act. Whilst a hotel keeper and a restaurant keeper may and do purchase and sell goods, the services they render to their guests are in the nature of work and labour rather than in the sale of goods; and so long as they confine their business to its legitimate limits, they are not within the Act. If they go beyond these limits they may become merchants or traders and so bring themselves within the Act.

2. Whilst carrying on such business they may sell cigars as an incident to a meal presumably for consumption on the premises. They would become merchants or traders if they sell cigars, candy, etc., as merchandise.

3. The proprietor of a news stand in a hotel who sells cigars as part of his ordinary calling is a merchant or tradesman, and is within the statute.

4. A druggist who sells cigars to all comers is within the Act. A cigar is not a drug in the sense of its being a medicine nor is it a necessity.

5. Works of necessity and charity as used in the statute contemplate the necessity of the person who works and not him who compels the work. A merchant may, as an act of mercy towards someone in need, do that which would bring him within the statute, but the necessity of purchaser might justify the conduct of the merchant as an act of mercy.

E. Bayly, K.C., and *R. U. McPherson*, for the Crown. *Haverson*, K.C., *Robinette*, K.C., and *H. C. Macdonald*, for the various defendants.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] FORNSICA *v.* JONES. [June 13.

Deed of settlement—Improvidence—Trust—Revocation—Independent advice—Rule against perpetuities.

Appeal from judgment of MATHERS, C.J., noted vol. 46, p. 386, dismissed with costs, but right reserved to widow to bring new action.

KING'S BENCH.

Macdonald, J.] [May 25.

THE KING *v.* SUCK SIN.

Magistrate—Bias—Disqualification—Pecuniary interest—Trial of charge by magistrate who is also a member of the board of police commissioners of a city—Resolution of commissioners instructing prosecution of that class of offences—Prohibition—Practice—Civil or criminal proceeding.

Held, 1. The police magistrate of the city of Winnipeg, who is also by statute a member of the board of police commissioners, is not disqualified to hear and determine a charge of selling liquor without a license by reason of having, at a meeting of the board previously held, moved a resolution instructing a particular member of the police force to take active steps for the prosecution of offences against the Liquor License Act in unlicensed places, without naming any individual or class of persons, although the charge in question had been laid by that officer. *Queen* v. *Handsley,* 3 Q.B.D. 383, and *Reg.* v. *Pattitmangin,* 9 L.T.N.S. 683, followed. *Queen* v. *Lee,* 9 Q.B.D. 394; *Queen* v. *Allan,* 4 B. & S. 915, and *Queen* v. *Henley* (1892), 1 Q.B. 504, distinguished.

2. The police magistrate of the city is not disqualified to hear and dispose of such a charge by reason of his being a ratepayer of the city and so benefiting to a small extent by any fine which might be imposed, part of which would be received by the city, or by reason of his being paid a salary by the city. *Ex parte McCoy,* 1 C.C.C. 410, followed.

3. An application for an order to prohibit a migistrate from hearing a criminal charge on the ground of disqualification through bias is itself a civil and not a criminal proceeding, and the practice to be followed is that laid down in the King's Bench Act, R.S.M. 1902, c. 40, and the rules thereunder, instead of by rule nisi as in criminal proceedings.

Phillips and *Whitla,* for defendants. *Patterson,* K.C., D.A.G., for the Crown.

COUNTY COURT OF BRANDON.

Cumberland, Co.J.] [March 21.

WALLACE *v.* FLEMING.

Election petition—Municipal election—Municipal Act, R.S.M. 1902, c. 116, ss. 90, 116, 118, 191, 287—Irregularities of officials conducting elections—Directory or imperative requirements of statute—Illiterate voters—Secrecy of the ballot.

Sections 90, 116, 118, 191 and 287 of the Municipal Act, R.S.M. 1902, c. 116, relating to the duties of the municipal officers in connection with the holding of the annual election of the mayor of a city, are directory and not imperative, and breaches of any or all of those sections by the officers, not amounting to wilful misconduct, and not materially affecting the result of the polling, will not be sufficient to warrant the declaring of the election void. *Woodward* v. *Sarsons*, L.R. 10 C.P. 747, followed.

The following irregularities and omissions, therefore, were held not to be fatal to the election:

1. That the clerk did not post up notices giving the names of the candidates in all the places pointed out by section 90, but only in two of them. *Re Wycott and Ernestown*, 38 U.C.R. 533, followed. Cases arising under the Canada Temperance Act, or under local option clauses of Liquor License Acts, such as *Hatch* v. *Oakland*, 19 M.R. 692; *Re Mace and Frontenac*, 42 U.C.R. 70; *Re Henderson and Mono*, 9 O.W.R. 599, and *Hall* v. *South Norfolk*, 8 M.R. 437, distinguished.

2. That the clerk did not, as required by section 287, furnish each of the deputy returning officers with two copies of sections 276 to 287 inclusive (the sections dealing with corrupt practices) and did not post up a copy in his office and one in the post-office. *West Gwillimbury* v. *Simcoe*, 20 Gr. 211, followed.

3. That most of the deputy returning officers, poll clerks and agents failed to take the oath of secrecy as to the marking of the ballots required by section 191, there being nothing to indicate that the officials did not, in fact, substantially maintain the secrecy of the ballot or that they permitted any invasion of that principle. *Wynn* v. *Weston*, 15 O.L.R. 1, followed.

4. That the clerk, as returning officer, relieved the deputy and acted in his stead for a short time in each of three polling places on the polling day, although the ballots initialled by him were disallowed. *Watterworth* v. *Buchanan*, 28 O.R. 352, 357, and *Re Ellis and Renfrew*, 21 O.L.R. 74, 85, followed.

5. That, in taking the votes of a large number of persons unable to read, the deputy returning officers went into the voting compartments with the voters and marked their ballots or caused them to be marked out of the sight of the agents of the candidates contrary to section 116, and this without any declarations of inability to read having been made by the voters, as most of them were foreigners unable to understand English and the deputies apparently acted in good faith.

6. That a number of the deputies failed to make the declaration prescribed by section 118 as to the proper keeping of the poll book.

Held, also, that it would not be proper to deduct from the total vote cast for the successful candidate votes to the number of the assisted voters who had not made the declaration of inability to read, as the petitioner had brought out in evidence that many of the latter had marked their ballots for him. *Re Prongley, Re Ellis, and Re Schumacher*, all in 21 O.L.R., at pp. 54, 74, and 522, respectively, followed.

In re Shoal Lake, 20 M.R. 36, dissented from.

Preudhomme, for petitioner. *Curran*, K.C., for respondent Fleming. *Henderson*, K.C., for other respondents.

Book Reviews.

The Canadian Ten Year Digest, 1901-1910, *inclusive*. By W. J. Tremeear, of Osgoode Hall, Barrister-at-law. In two large volumes. Canada Law Book Company, Limited, Toronto. 1911.

This digest, just completed, of both federal and provincial decisions, authorized by the Law Society of Upper Canada, and based upon the head notes of the official reports, will no doubt be the standard digest of Canada for the next ten years. The classification of titles and the method of sub-division are both admirable, and it is to be hoped that the semi-annual or annual digests for future years will follow the same practical classification which this digest contains. For example we take the title "Master and Servant." Under this heading are the two general divisions, first of "Wages, Hiring and Dismissal" and secondly of "Employers' Liability for Negligence." Each of these is again sub-divided into four territorial sub-divisions under which appear the decisions given in "Ontario," "Que-

bec," "Eastern Provinces," and "Western Provinces," the latter division including cases reported in the North-West Territories Reports during the decade, the decisions in British Columbia and Manitoba and the cases in the Alberta and Saskatchewan Reports. References are also given to additional cases in the "Eastern Law Reporter" and "Western Law Reporter" not officially reported. Canadian appeals to the Privy Council are, of course, included for the ten year period. The typographical management of the work is excellent. A large appendix gives the references to Ontario cases appearing in the Ontario Weekly Reporter which either have not been officially reported or which, although reported in appeal, shew the decisions at nisi prius or on interlocutory motions. The tables of cases affirmed, reversed or considered, is very complete. The whole work reflects great credit upon Mr. Tremeear and his assistants.

A Treatise upon the law of Light. Including an exposition of the law relating to the nature, acquisition, preservation, and extinguishment of the easement or right to light, and the remedies afforded for the protection of window lights. By R. G. NICHOLSON COMBE, of Inner Temple, Barrister-at-law. London: Butterworth & Co., 11 & 12 Bell Yard, Temple Bar, Law Publishers. 1911.

This important branch of the law of easements is not of as much interest in this country as it is in the British Isles; nor, under our legislation, is it likely to be so. We note for example that the Ontario Ten Years Digest, recently published refers to less than half a dozen cases on the subject of light in that province. Many cases, however, will doubtless arise from time to time where the information to be found in this excellent treatise will be of the greatest use. A cursory examination of Mr. Combe's book indicates very clearly that he has great gifts as a legal text-writer. The author adopts in his work two new phrases, coined by himself for the purpose, under which he accurately and conveniently groups his material; he styles the accessorial right of light as "Light Easement," and uses the term "Light Nuisance" to describe the wrong worked by obstruction, which amounts to an actionable interference with the light.

As the author correctly says, prescription is an important branch of the Law of Light; and so he devotes three chapters to that subject. Even if there were nothing in the book but the

lucid statements of the law as to the abstruse doctrine of prescription, the book should find a place in every lawyer's library.

Its contents are divided as follows: Chap. I., Introduction; II., Nature and extent of the easement of light; III., Creation of the right to light by express grant; IV., Easements of light arising by implication of law; V., The doctrine of prescription; VI., Prescriptive claims to light apart from the Prescription Act; VII., Statutory prescription to light; VIII., Extinguishment and variation of light easements; IX., Remedies for disturbance of light easements.

A Treatise on the Law of Bills of Exchange, Promissory Notes, Bank-notes and Cheques. By Right Hon. Sir JOHN BARNARD BYLES, late one of the Judges of the Court of Common Pleas. 17th edition. By W. J. BARNARD BYLES and ERIC R. WATSON, Barristers-at-law. London: Sweet & Maxwell, 3 Chancery Lane. 1911.

The first edition of this book was published in 1829 and has been, as our readers are aware, the leading authority on the subject from that day to this. An important change has been made in the present edition by inserting the actual words of the Act of 1882 in the text, in compliance, as the present editors state, with a suggestion to that effect contained in various criticisms of recent editions. This necessarily involved many changes and alterations in the text, but the editors have wisely made as few of them as possible. There has also been a careful revision of the notes, eliminating old and effete authorities, and retaining only those cases which are of practical importance at the present time, and inserting all decisions since the last edition, which was published in 1899. The typographical appearance of the book has been greatly improved by larger pages and larger type.

Challis's Law of Real Property Chiefly in Relation to Conveyancing. 3rd edition. By CHARLES SWEET, Barrister-at-law. London: Butterworth & Co., 11 and 12 Bell Yard. 1911.

In this volume Mr. Challis's text and notes are reprinted verbatim from his second edition, and the additions and comments of the present editor are enclosed in square brackets indicating his views which occasionally dissent from those of the author. Both author and editor express their views with much

freedom and definiteness; for example, the author comments upon the language of the statute, 12 Car. 2, c. 24 which has been ascribed, like the Statute of Frauds, to Lord Hale, as being "marked by an iteration always inept and sometimes perversely maladroit, which is a surprising feature of such authorship." An example of the editor's dissenting comments appears on p. 467, and like his other comments is well worthy of consideration. A very thoughtful and valuable work.

The Law Quarterly Review. Edited by SIR FREDERICK POLLOCK, Bart., D.C.L. London: Stevens & Sons, Limited, 119 and 120 Chancery Lane.

The April number of this, the leading law magazine of England and of world-wide reputation is quite up to its usual high average. It contains the usual interesting notes and the following papers: Some recent decisions on the rule against perpetuities; The report of the Land Transfer Commissioners. Mr. Underhill in this article discusses the long expected and recently issued report of this Commission. The task it undertook was a most difficult one. A radical change was impossible and it is said that perhaps too much has been attempted. It is impossible for us in this country to understand the great difficulties attendant upon any change of system as to land registration in Great Britain, but a beginning has been made, and those concerned may expect beneficial results eventually. The subject of jurisprudence is learnedly dealt with by Mr. A. H. F. Lefroy, K.C., of the Ontario Bar. A paper discussing a Digest of English Case Law foreshadows the possibility and advisability of something which would be in the nature of a code though not so called. We copy elsewhere an interesting article on the Right of Asylum. Other papers are The Policy of the Mortmain Acts; The Resurrection of our Criminal Code, etc. The usual book reviews conclude the number.

The German Law of Bills of Exchange and of Cheques. By SIDNEY LEADER, Solicitor. London: Sweet & Maxwell, 3 Chancery Lane. 1911.

This is a translation of the latest text of the "Wechselordnung," etc., which came into force in 1908. It cannot be said that this book is of much value to the profession in this country, except to the few who have clients having direct trade relations

with Germany. But it is very interesting to know the nature of that country's negotiable instruments, as to which there is a marked difference between their use and ours.

Analysis of Williams on the Law of Personal Property. For the use of students, with an appendix of questions. By A. M. WILSHERE, Barrister-at-law. London: Sweet & Maxwell, Ltd., Law Publishers, 3 Chancery Lane. 1911.

This is one of the series published by these well-known law publishers for the use of students. It claims to be "a note-book and nothing more"; but students would do well to have it before the examination day. Mr. Wilshere's experience as a lecturer and examiner is a sufficient guarantee of the excellence of the contents.

The Law of Ejectment or Recovery of the Possession of Land. By J. H. WILLIAMS and W. B. YATES, Barristers-at-law. 2nd edition. London: Sweet & Maxwell, Limited, 3 Chancery Lane. 1911.

During the 16 years which have elapsed since the first appearance of this work there have been many decisions and several statutes requiring the attention of the authors and necessitating a new edition and increasing the size of the volume to 440 pages. A very handy book of reference with some useful forms.

Flotsam and Jetsam.

There is a rather good story of inept advocacy in Mr. Birrell's Life of Frank Lockwood, which we were reading the other evening. Once in the Court of Chancery a witness was asked in cross-examination by an eminent Chancery leader whether it was true that he had been convicted of perjury. The witness owned the soft impeachment, and the cross-examining counsel very properly sat down. Then it became the duty of an equally eminent Chancery Q.C. to re-examine. "Yes," said he, "it is true you have been convicted of perjury. But tell me: Have you not on many other occasions been accused of perjury and been acquitted?"—*Law Notes.*

Canada Law Journal.

VOL. XLVII. TORONTO, JULY. Nos. 13 & 14.

THE CORONATION.

It is on occasions such as this that we are reminded of the great traditions of the British race; and the blending, according to the ancient usage, of the rites of religion with the affairs of state, is, at the coronation, a conspicuous, we might say the dominating, feature of the occasion. Though to some the coronation rites and ceremonies may seem to be superfluous and even to savour of superstition, yet to others who are blessed with imagination, they are full of significance. The recognition of His Majesty as lawful King by that great assembly recalls the fact that Royal power and authority has, as its ultimate foundation, the consent of the people. The anointing and the other symbolic ceremonies, as Bishop Stubbs points out, are to be understood as typifying rather than as conveying the spiritual gifts for which prayer is made, and they come down to us hallowed by ancient and immemorial custom, and though to the matter-of-fact man of the present day, they may seem out of place and no longer appropriate, yet to those who have respect to the past and to the fact that the King is set as a beacon to his people, it seems well to surround him on this momentous occasion with a halo of sanctity, not that the "sacring" of the King was ever an affirmance of Divine right. That "the powers that be are ordained of God" was a truth recognized as a motive to obedience, without any suspicion of the doctrine, so falsely imputed to churchmen of all ages, of the indefeasible sanctity of royalty. The same conclusion may be drawn from the compact made by the King with his people and the oaths taken by both. " If coronation and unction had implied an indefeasible right to obedience, the oath of allegiance on the one side, and the promise of good government on the other, would have been superfluous." Stubb's Con. Hist. c. 6, 163.

But though we dismiss as untenable the theory of the Divine right of Kings, we cannot forget that, though the autocratic powers of Kings have in process of time grown less and less, their moral influence for weal or woe was perhaps never greater than at the present time. Kings and Queens nowadays live in the full glare of a publicity unknown to their predecessors and they can no longer, even if they would, live regardless of public opinion, nor can they fail to realize that they possess an opportunity of exercising an ethical force of incalculable value to their people. We have reason to hope and believe that in the present occupants of the throne of England we have a King and Queen whose constant aim will be the moral welfare of their people, and who are permeated with the consciousness that one duty they owe them is to set them an example of virtuous and godly living. Therefore, we say, God save our King and Queen.

The message of the King to his people since the Coronation seems to give assurance that the hopes and expectations above expressed will be realized. We gladly reproduce his appropriate and thoughtful words:—

"To My People:—Now that the Coronation and its attendant ceremonies are over, I desire to assure the people of the British Empire of my grateful sense that their hearts have been with me through it all. I feel this in the beautiful and impressive service in the Abbey, the most solemn experience of my life, and scarcely less in the stirring scenes of the succeeding days, when my people have signified their recognition and their heartfelt welcome of me as their Sovereign, for this has been apparent not only in the loyal enthusiasm shewn in our passage to and from Westminster, and in the progresses which we have made in the different districts of London, but also in the thousands of messages of goodwill which have come to me across the seas from every part of the Empire. Such affectionate demonstrations have profoundly touched me and have filled me afresh with faith and confidence. Believing that this generous, outspoken sympathy with the Queen and myself is, under God, our surest source of strength, I am encouraged to go forward with renewed

hope that whatever perplexities or difficulties may be before me and my people we shall all unite in facing them resolutely and calmly, and with public spirit, confident that under Divine guidance the ultimate outcome will be to the common good."

THE DOCTRINE OF "STARE DECISIS," IN COUNTY COURT AND MECHANIC'S LIEN APPEALS.

The recent decision of the Chancery Division in *Farrell* v. *Gallagher*, 23 O.L.R. 130, indicates a rather surprising extension of a principle which was first emphasized in this province in *Canadian Bank of Commerce* v. *Perram*, 31 O.R. 116, and subsequently followed in *Mercier* v. *Campbell*, 14 O.L.R. 639. As a preliminary to the discussion of these decisions, it is desirable to refer to s. 81 of the Judicature Act, which is as follows:—

"81. (1) The decision of a Divisional Court of the Court of Appeal on a question of law or practice shall, unless overruled or otherwise impugned by a higher court, be binding on the Court of Appeal and all Divisional Courts thereof, as well as on all other courts and judges, and shall not be departed from in subsequent cases without the concurrence of the judges who gave the decision, unless and until so overruled or impugned. (2) It shall not be competent for the High Court or any judges thereof in any case arising before such court or judge to disregard or depart from a prior known decision of any court or judge of co-ordinate authority on any question of law or practice without the concurrence of the judges or judge who gave the decision; but if a court or judge deems the decision previously given to be wrong and of sufficient importance to be considered in a higher court, such court or judge may refer the question to such higher court: 58 V. c. 12, s. 79; c. 13, s. 9."

It is stated in Holmested & Langton that the above quoted sub-s. (2) was intended to prevent such a result as occurred in *Stevens* v. *Grout*, 16 P.R. 210, and *McDermott* v. *Grout*, 16

P.R. 215, where two Divisional Courts decided differently the same point in two actions which had been tried together. A similar difficulty had previously arisen in the cases of *Sears* v. *Meyers* and *Heath* v. *Meyers*, 15 P.R. 381, where it was laid down that a court is not bound by the decision of a court of co-ordinate jurisdiction when the matter is one of jurisdiction and involving the settling of a new practice. It had also been stated by the late Chief Justice Hagarty, in delivering the judgment of the court in *Donnelly* v. *Stewart*, 25 U.C.R. 398, in an appeal from the County Court of Hastings, that as his decision in that appeal was final, the court might not necessarily be bound by a previous decision of the same court in the case of *McPherson* v. *Forester*, 11 U.C.R. 362, though he concluded that he was not prepared to dissent from it after it had remained unquestioned for 13 years.

After the passing of the above Act, the case of *Canadian Bank of Commerce* v. *Perram* came before the King's Bench Division on appeal from the County Court of York. The judgment was delivered by Armour, C.J., and he declined to follow a previous decision of the Court of Appeal on the same point in *Duthie* v. *Essery*, 22 A.R. 191, saying: "As this is the ultimate court of appeal in this County Court case, we are bound to give our independent judgment."

The same point again came before the King's Bench Division in an appeal from the County Court of Prescott and Russell, in the case of *Mercier* v. *Campbell*, above mentioned. Mr. Justice Riddell, in the course of an elaborate judgment, thus deals with this point at pp. 644-5: "As we are the court of last resort in this matter, we, at the hearing, called for argument upon the question as to whether we were bound by the decision of a Divisional Court, it appearing to us that a decision of the Common Pleas Division hereafter to be referred to might govern the case. Mr. Macintosh argued that we were so bound, citing the Ontario Judicature Act, sec. 81 (2), Holmested & Langton, 3rd ed., p. 140, but said he had not found any decision in that sense. We have not found any. Mr. Middleton cited the case

of *Canadian Bank of Commerce* v. *Perram*, 31 O.R. 116, in which a Divisional Court, sitting, as we are, in appeal from a County Court, refused to be governed by previous decisions, and held that the court was bound to exercise an independent judgment. Other cases were cited, decided under the Railway Act, more or less applicable. I think we must give an independent judgment, and adopt the decision in 31 O.R. Any other conclusion would lead to a dilemma similar to that which has amused students for twenty centuries and more. The ancient Cretan who asserted so stoutly that 'Cretans are always liars,' was proved to be lying, whether he told the truth or not. So, on the plaintiff's contention, we are reduced to the paradox that, if we are bound by a Divisional Court judgment, we are bound by that in 31 O.R. to hold that we are not bound. On principle, however, I am of the opinion that the section cited does not refer to a court of final appeal. It is necessary to consider the case without regard to the decision just referred to."

The case of *Farrell* v. *Gallagher*, 23 O.L.R. 130, above referred to, was a mechanic's lien action, brought by the contractor and certain lien holders who had done work and furnished materials. In consequence of the contractor's default, the owner took the work out of his hands before completion. The Referee found the plaintiff entitled to $739.90, and gave judgment for that amount, first to the wage earners in full, and the balance to the material men, following the decision of the King's Bench Division in *Russell* v. *French*, 28 O.R. 215. The judgment of the court was delivered by Mr. Justice Middleton, who reversed the finding as regards the material men, and at pp. 135-6 said as follows: "The case of *Russell* v. *French* (1897), 28 O.R. 215, is precisely in point. It is there held that the 20 per cent. is a fund for the payment of lien-holders, not subject to be affected by the failure of the contractor to perform his contract. This view is in conflict with the reasoning of *Goddard* v. *Coulson* (1884), 10 A.R. 1, and the decision in *In re Sears and Woods* (1893), 23 O.R. 474, which are said to be no longer applicable by reason of changes in the statute. The statute has

since been revised and in some particulars changed, but we cannot find any real grounds upon which the case can be distinguished. The soundness of the decision, however, is challenged, and, according to *Mercier* v. *Campbell* (1907), 14 O.L.R. 639, it is not conclusive authority, and we are bound to make an independent examination of the statute and earlier cases and to act upon our own opinion."

This decision certainly carries the law beyond anything laid down in the previous judgments above referred to. In these cases, the Divisional Court was the final court of appeal, and Mr. Justice Riddell, in *Mercier* v. *Campbell*, says with reference to s. 81 above quoted: "On principle, I am of the opinion that the section cited does not refer to a court of final appeal." However this may be, no such reasoning can be applicable in the *Farrell* case, as under s. 40 of the Mechanics' and Wage Earners' Lien Act, the decision of a Divisional Court is final only where the aggregate amount of the claims of the plaintiff and all other persons claiming liens, is not more than $500. In this case the aggregate amount was considerably over that sum, and as a matter of fact, an application was made by the plaintiff for leave to appeal to the Court of Appeal (see 2 O.W.N. 815). The Chief Justice, in refusing leave, referred to the fact that the lien holders had not sought to appeal from the judgment, and added: "The plaintiffs have no locus standi to assert the rights of the sub-contractors against the defendant Mrs. Gallagher. Rightly or wrongly it has been held that these sub-contractors have no lien against Mrs. Gallagher's land, and consequently she is not liable to pay them." It is a fair inference from this statement, that if the lien holders had applied for leave to appeal, such leave could and might have been granted.

Without at all going into the merits of the decision of the Divisional Court, one cannot view without some concern, the extension of such a principle; and it is apparent that even the exemption from the operation of section 81 of the Judicature Act, claimed by Mr. Justice Riddell, does not represent the views of all the judges. After the enactment of this section, the

case of *Toronto Auer Light Co.* v. *Colling* came before the Chancery Division on appeal from the County Court of York, and the Chancellor in delivering the judgment of the court, 31 O.R. at page 27 said: "Though this is the final court of appeal in this litigation, still I think it is our duty to defer to the various cases which affirm the validity of the patent, and to follow the example of the Court of Appeal in the unreported case of *Welsbach Co.* v. *Stannard*, in which the court refused to disturb the decision in the *O'Brien* case (1897), 5 Ex. C.R. 243."

In *Slater* v. *Laboree*, 10 O.L.R. 648, which was an appeal from the junior judge of Carleton, Meredith, C.J., in delivering the judgment of the court affirming the judgment below, said: "The learned judge of the Division Court held that he was bound to follow the decision of the Supreme Court of Canada in *Robinson* v. *Mann*, 31 S.C.R. 484, and he accordingly gave judgment for the respondents. We are of the opinion that the learned judge was right in following *Robinson* v. *Mann*, which is an express and the latest decision on the very point raised by the appellant. It was not for the learned judge, nor is it for us to question whether a decision of the highest court in Canada is in accordance with the previous cases. It is our duty, as it was his to follow it."

In the case of *Crowe* v. *Graham*, 22 O.L.R. 145, which was heard before a Divisional Court composed of the Chancellor, Riddell, J., and Middleton, J., on appeal from the County Court of Hastings, the Chancellor said, in discussing this point, at p. 147: "The other Canadian case of *Donnelly* v. *Stewart*, 25 U.C.R. 398, does not carry the matter any further; it merely affirms the earlier case, but apparently on the ground that, by reason of its having stood thirteen years unquestioned, the court was not disposed to depart from it except on the strongest grounds. That case indicates, I think, the course that should be taken by us, viz., to follow the earlier cases, which have now for over fifty years been regarded as law. As this case cannot be taken to the Court of Appeal, it must be left for the consideration of the Legislature as to whether any change should be made

on this point of law." Mr. Justice Riddell, at p. 148, dealt with this point as follows: "It has been pointed out, both before and since the Ontario Judicature Act, and before and since 58 Vict. c. 12, s. 79, now s. 81 of the Ontario Judicature Act, that a court sitting in appeal from a County Court decision, being the final court, is not bound by previous decisions; per Hagarty, J., in *Donnelly* v. *Stewart*, 25 U.C.R., at p. 398; per Armour, C.J., in *Canadian Bank of Commerce* v. *Perram* (1899), 31 O.R. 116, at p. 118; *Mercier* v. *Campbell* (1907), 14 O.L.R. 639, at p. 645 (in the first two cases by a judge giving the judgment of the court). If the case stood thus without anything further, we might not follow the cases in 11 and 25 U.C.R. without inquiring into the soundness of the decisions. But there are authorities which we are bound to follow, whether they recommend themselves to our judgment or not."

The authorities referred to, consisting of decisions of the Court of Appeal in England, and which are declared by the Privy Council to be binding on Colonial courts, are then discussed by the learned judge in detail. But one cannot well understand why a decision of the Court of Appeal in England should be of more binding authority upon an Ontario Divisional Court, sitting in appeal from a County Court, than would be a decision of our own Court of Appeal, such as that of *Duthie* v. *Essery*, above referred to; nor why such latter decision should not be as binding upon a Divisional Court as a decision of the Supreme Court like that of *Robinson* v. *Mann*. It may not be out of place to here remark that *Robinson* v. *Mann* affirmed *Duthie* v. *Essery*, and therefore overruled *Canadian Bank of Commerce* v. *Perram*.

The practical result of the cases is to establish a different principle of decision in County Court appeals, from that followed in High Court appeals, notwithstanding the fact that Con. Rule 1217 expressly provides that "motions against judgments and for new trials in actions in the County Court shall be disposed of upon the like grounds and principles as in the High Court." As things are at present, it is impossible for a county judge or

an officer trying a mechanic's lien action, to decide a matter with any certainty that the decision of a Divisional Court or even of a higher court, upon which his judgment is based, will be followed, in case an appeal is taken from him. If it is necessary that there should be further legislation to prevent the continuance of this anomaly, the sooner it is introduced and enacted the better.

For an interesting discussion of the doctrine of stare decisis, see the judgment of Mr. Justice Anglin, in the case of *Stuart* v. *Bank of Montreal*, 41 S.C.R., at p. 536. See also a previous article by the writer in vol. 22 Canada Law Times, p. 419, on the lack of judicial agreement as to the meaning of the words "ascertained by the act of the parties" in the County Courts Act, which words have now been fortunately eliminated from the statute.

M. J. GORMAN.

OTTAWA.

A DISGRACE TO THE BENCH.

It would be difficult to find in judicial annals anything to equal the incident which appears in the public press in reference to a judge of the Northern Judicial Circuit, of the State of Georgia. Two negroes were accused of assaulting a woman. It was necessary to send them to an adjoining county for trial. The authorities told the judge who gave the order for their transmission, that they would be lynched on the way, if they were not guarded by troops; and he was asked to order an escort for them. This he refused to do and the men were lynched accordingly. The reason given by this disgrace to the Bench was thus expressed: "I do not propose to be the engine of sacrificing any white man's life for all the negro rapists in the country. (They were not yet tried and therefore still technically innocent.) I would not imperil the life of one white man to save the life of a hundred negro criminals. If I called out the military, and some young man among them was killed, I would never forgive myself. The clods falling on the grave of such a one would ring

in my ears as long as life lasted." It is unnecessary in a legal journal to enlarge on such an exhibition of judicial imbecility, cowardice, and disregard of duty. For the sake of his country it is to be hoped that there are none others occupying such a position who would act in such a dastardly manner.

The *Law Magazine and Review* for May contains an article on the law relating to commissions and tips. The writer sums up his conclusions as follows:—

(1) Commissions and tips, if open and unconcealed, and given to the agent with the principal's knowledge, are legal.

(2) Commissions and tips, given to the agent without the principal's knowledge and for the purpose of influencing him in relation to his principal's affairs, even if the principal did not suffer any injury, are illegal. The principal has (*a*) a civil remedy, and may recover the amount of the bribe from the agent. He had also (*b*) a criminal remedy both at common law and under the Prevention of Corruption Act, 1906, and may prosecute the agent.

In conclusion, it may be stated that the law relating to tips, came under consideration in 1908 in the case of *Penn* v. *Spiers and Pond*, L.R. [1908] 1 K.B. 766. In that case the question arose as to whether the "tips" given to a waiter on a restaurant car running on the London and South Western Railway were part of his "earnings" under the Workmen's Compensation Act, 1906. The Court of Appeal held that they were. The Master of the Rolls, in giving judgment, said: "We desire to state that nothing in this judgment extends to "tips" or "gratuities" (*a*) which are illicit; (*b*) which involve or encourage a neglect or breach of duty on the part of the recipient to his employer; or (*c*) which are casual and sporadic and trivial in amount. But where the employment is of such nature that the habitual giving and receiving of "tips" is open and notorious, and sanctioned by the employer, so that he could not complain of the retention by the servant of the money thus received, we think the money thus received with his knowledge and approval ought to be brought into account in estimating the average weekly earnings."

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

ADMINISTRATION—LEGATEE DEBTOR—RETAINER OF LEGACY IN SATISFACTION OF DEBT DUE TESTATOR'S ESTATE—SET OFF.

In *Turner* v. *Turner* (1911) 1 Ch. 716 a question arose in the winding-up of a partnership. The firm was indebted to a deceased testatrix who had, by her will, bequeathed legacies to both members of the firm; and the question was whether there was any right of retainer or set-off of the individual legacies against the debt due by the firm. It was contended that *Smith* v. *Smith*, 3 Giff. 263, 270, had decided that the right of set-off claimed did exist, but the Court of Appeal (Cozens-Hardy, M.R., and Moulton, and Buckley, L.JJ.) held that that case only decided that the assignees in bankruptcy of a firm indebted to an estate were not entitled to recover a legacy bequeathed to one of the members of the firm, without first paying the firm debt. But the Master of the Rolls points out that the assignees in bankruptcy of a member of a partnership were at the date of that decision assignees both of the joint and separate estates of such partner, but that a partner so long as the firm is in existence, is only jointly liable for partnership debts, although on his death or bankruptcy his estate is severally liable in due course of administration for partnership debts, but subject to the prior payment of his separate debts. In the present case the firm being in esse, the Court of Appeal held that the right of retainer or set-off of the legacies to individual partners against a debt due by the firm of which they were members did not exist.

FIDUCIARY RELATION—GIFT—NATURAL AFFECTION—DUAL RELATION EXISTING BETWEEN DONOR AND DONEE—INDEPENDENT ADVICE—MOTHER AND SON.

In re Coomber, Coomber v. *Coomber* (1911) 1 Ch. 723, the Court of Appeal (Cozens-Hardy, M.R., and Moulton, and Buckley, L.JJ.) have affirmed the decision of Neville, J. (1911), 1 Ch. 174 (noted ante, p. 222), but on somewhat different grounds. It may be remembered that the action was brought to impeach a gift from mother to son for want of independent advice. Neville, J., upheld the gift as being made in consideration of natural affection, and because the donee thought that

in making it she was carrying out her deceased husband's wishes. The Court of Appeal proceeded on a somewhat broader ground, that it is not every fiduciary relation between a donor and donee which will induce a court of equity to set aside a gift for want of independent advice, but only where the relations between the donor and donee raise a presumption of undue influence, and that it is sufficient if an independent adviser sees that a donor understands what he is doing and intends to do it, and that it is not necessary for him to advise him to do it, or not to do it; as Moulton, L.J., puts it, independent and competent advice, does not mean independent and competent approval.

COMPANY—WINDING-UP—"SURPLUS ASSETS."

In re Ramel Syndicate (1911) 1 Ch. 749. In this case a company was being wound up. By its articles of association there were two classes of shares of £1 and 1s. each. The former was called class A and the other class B and it was provided that in the event of the company being wound up "the surplus assets" were to be equally divided, one half to be distributable among class A and the other among class B. The point Neville, J., was called on to decide was, whether the expression "surplus assets" meant the surplus which remained after payment of all the debts and outside obligations of the company, or whether it meant the surplus left after payment of all debts and the return of all paid up capital to the shareholders; and the learned Judge came to the conclusion that the latter alternative was the proper meaning of the words.

MUNICIPALITY—COUNCILLOR—DISQUALIFICATION — JOINT COMMITTEE FOR TWO DISTRICTS—CLERK OF COMMITTEE—(CON. MUNICIPAL ACT (3 EDW. VII. c. 19) s. 80).

Greville-Smith v. *Tomlin* (1911) 2 K.B. 9. In this case two municipal bodies had formed a joint committee composed of members of each corporation for the purpose of providing hospital accommodation for the use of inhabitants of both municipalities, the defendant, a councillor of one of the municipalities, was appointed secretary of this committee and paid for his services out of a fund contributed to by both municipalities. On a case stated by justices a Divisional Court (Lord Alverstone, C.J., and Ridley, and Channell, JJ.) held, that the defendant was the holder of a paid office under the council of which he was

a member, and as such had become disqualified to act, and had subjected himself to a penalty for acting as a member of the council after he had incurred such disqualification (see Ont. Munl. Act, s. 80).

EXTRADITION—REQUISITION OF FOREIGN GOVERNMENT FOR SURRENDER OF CRIMINAL—CONDITIONS OF TREATY—DEFECT IN PROCEDURE—JURISDICTION.

The King v. *Governor of Brixton Prison* (1911) 2 K.B. 82. This was an application made on the return of a habeas corpus for discharge from custody. The applicant was charged with obtaining money by false pretences. The offence was alleged to have been committed on a railway train, and there was some doubt whether it was committed in France or Belgium. On December 22, 1910, a deposition alleging the facts was sworn before a commissioner of police in Brussels, and on February 6, 1911 a warrant had been issued by a magistrate in France, it did not appear what evidence this magistrate acted on but presumably he had the deposition made in Brussels before him. At the time this warrant issued no depositions relating to the charge had been taken on oath before him. A requisition by the French diplomatic representative having been made to the Home Secretary, he issued an order addressed to the chief magistrate at Bow Street signifying that the requisition had been made, and requiring him to issue a warrant for the defendant's arrest, which having been done, and the defendant having been taken into custody thereunder, he was committed to prison by the magistrate to further answer the charge against him. By the treaty between France and England it was provided that requisition for extradition should be accompanied by the warrant and depositions, and the prisoner contended that the omission to send depositions from France entitled him to be discharged. But the Divisional Court (Ridley, Darling and Channell, JJ.) held that that was a matter merely for the Home Secretary's discretion and that the prisoner could not claim his discharge merely because the Home Secretary had not seen fit to require depositions, and that his order to the magistrate was sufficient to give the latter jurisdiction to issue the warrant and to commit the defendant. The application was therefore refused.

FOREIGN JUDGMENT—CRIMINAL PROSECUTION FOR NEGLIGENCE—CLAIM OF INJURED PERSON FOR DAMAGES—JUDGMENT FOR CRIMINAL OFFENCE; AND AWARD OF DAMAGES TO INJURED PERSON—SEVERABLE JUDGMENT—PENAL LAW.

Ranlin v. *Fischer* (1911) 2 K.B. 93. It appears that according to French law, where a person is prosecuted for criminal negligence, the person injured may intervene in the proceedings and claim damages for the injury sustained, which claim is tried along with the criminal charge, and a judgment pronounced both as to the criminal offence, and the civil claim for damages. In the present case the defendant, an American lady, had recklessly galloped her horse in the Avenue du Bois de Boulounge, and had run into and seriously injured the plaintiff. The defendant had been prosecuted in the French court for the offence, and the plaintiff had made a claim for, and had been awarded damages for the injury he had sustained. This part of the judgment he now sued upon in this action. The defendant contended that as, under the well-settled rule of international law, that one country will not enforce the penal laws of another country the claim could not be enforced in England; but Hamilton, J., who tried the action, held that the judgment in question was severable and that an action might be maintained in England on that part of it which awarded damages.

ADMINISTRATION—CREDITOR OF DECEASED DEBTOR—APPEAL—"PERSON AGGRIEVED"—(CON. RULE 358).

In re Kitson (1911) 2 K.B. 109. In this case the appellants had obtained an order for the administration of their deceased debtor's estate in the Chancery Division of the High Court. On the same day the respondents, who also claimed to be creditors of the deceased in respect of goods supplied by them after his death to his executrix who continued to carry on the deceased's business, presented a petition in bankruptcy on which an order was made for the administration of the deceased's estate in bankruptcy, and it was to set aside the latter order that the present appeal was brought and it was held by Phillimore and Horridge, JJ., that the appellants were persons aggrieved, and therefore entitled to appeal from the order in question—(see Con. Rule 358)—and also that the respondents were not in fact creditors of the deceased, and therefore that the court had no jurisdiction on their application to make an order to administer the estate in bankruptcy. The order appealed from was therefore vacated.

POISON—SALE OF POISON—POISONOUS SUBSTANCE FOR USE IN AGRICULTURE—BOTTLE NOT LABELLED WITH NAME AND ADDRESS OF SELLER—PHARMACY ACT (31-32 VICT. C. 121) SS. 15, 17—POISONS AND PHARMACY ACT, 1908 (8 EDW. VII. C. 55) S. 2—(1 GEO. V. C. 40, SS. 28, 30, ONT.).

Pharmaceutical Society v. *Jacks* (1911) 2 K.B. 115. This was a prosecution for breach of the Pharmacy Act. The defendant, who was not a chemist or druggist, was duly licensed to sell poisonous substances to be used in agriculture and horticulture; he had sold a poisonous substance for that purpose in a bottle which was not labelled with his name and address. He was sued for a penalty; sec. 15 of the English Act forbids all sales of poisons by others than registered chemists (see Ont. Act, s. 28), and section 17 empowers persons not registered as chemists to sell certain specified poisonous substances for use exclusively in agriculture or horticulture, but provides that such articles are to be sold conformably to regulations; and by order in council it was provided that such sales must not be made except the substance be enclosed in a vessel or receptacle and labelled "Poison" and with the name and address of the seller (see 1 Geo. V. c. 40, s. 30, Ont.). The defendant having sold a poisonous substance but omitted to label the package with his name and address, it was held that he was guilty of an offence against the Act under s. 15, and that none the less because the facts shewed that he had also committed an offence against s. 17.

DISTRESS DAMAGE FEASANT—IMPOUNDING DISTRESS—POUND IN SAME HUNDRED BUT MORE THAN THREE MILES DISTANT—1 P. & M. C. 12, S. 1—(1 GEO. V. C. 37, S. 50).

Coaker v. *Wilcocks* (1911) 2 K.B. 124. The Court of Appeal (Williams, Farwell, and Kennedy, L.JJ.) have affirmed the decision of the Divisional Court (1911) 1 K.B. 649 (noted ante, p. 298), to the effect, that under 1 P. & M. c. 12, s. 1 (1 Geo. V., c. 37, s. 40, Ont.), a distress taken damage feasant may be impounded in a pound in the same hundred although it be more than three miles from the place of distress.

TRADE UNION—SICK BENEFIT—AGREEMENT TO REPAY SUM RECEIVED AS BENEFIT—TRADE UNION ACT, 1871 (34-35 VICT. C. 31) S. 4—(R.S.C., C. 125, S. 4.)

Baker v. *Ingall* (1911) 2 K.B. 132. The defendant in this case was a member of a Friendly Society registered under the

Trade Union Act, 1871 (34-35 Vict. c. 31)—(see R.S.C., c. 125). By one of the rules of the Society in case the defendant became incapicitated for work by accident he was entitled to receive from the funds of the society £100; and on receiving such payment, he was required to sign and did sign an agreement to refund the money to the society on his again becoming able to work; and if a member in such circumstances failed to refund, the officers of the society were authorized to sue for the recovery of the money. The defendant had been incapacitated by accident, and had been paid £100, and he had subsequently become able to resume work, but had failed to refund the £100, and the present action was brought for its recovery. The defendant contended that under s. 4 of the Trade Union Act, 1871—(see R.S.C. c. 125, s. 4), the action could not be entertained; but a Divisional Court (Phillimore and Bankes, JJ.), held that the action did not come within that section and was therefore maintainable.

COMPANY—JUDGMENT DEBT—EXECUTION—ISSUE OF EXECUTION STAYED BY TRICK—LIQUIDATION—LEAVE TO PROCEED ON EXECUTION NOTWITHSTANDING WINDING-UP PROCEEDINGS—WINDING-UP—COMPANIES ACT, 1908 (8 EDW. VII. c. 69) s. 140—(WINDING-UP ACT (R.S.C. c. 144, s. 22).

Amorduct Manufacturing Co. v. *General Incandescent Co.* (1911) 2 K.B. 143. In this case the plaintiffs obtained judgment against the defendants on February 24, 1911, and the plaintiffs' solicitor applied to the defendants' solicitor to obtain and send him the defendants' cheque in settlement of the judgment debt. The plaintiffs' solicitor was led by the defendants' solicitor to believe that this would be done and in consequence delayed issuing execution, but on 25th February, unknown to the plaintiff, or their solicitor, the defendants had sent out notice convening a meeting on March 6th for the purpose of passing a resolution for the voluntary winding-up of the defendant company. The meeting was held on March 6th and the resolution passed. On the same day the judgment debt not having been paid execution was issued. The sheriff took out an interpleader summons in which the liquidator was claimant. Lawrance, J., on the ex parte application of the liquidator ordered the sheriff to withdraw from possession and stayed the interpleader proceedings. The plaintiffs then took out a summons to set aside the order of Lawrance, J., or to

vary it by directing the trial of an interpleader issue between the plaintiffs and the liquidator; on this application Bucknill, J., made an order that the sheriff do withdraw from possession and from this the plaintiffs appealed; and the Court of Appeal (Farewell and Kennedy, L.JJ.), allowed the appeal, being of the opinion that the plaintiffs had been tricked into postponing the issue of their execution, and that neither the defendant company nor its other creditors, were entitled to any benefit from that trick.

MUNICIPALITY—FIRE PLUG—MISLEADING INDICATION PLATE—DELAY IN EXTINGUISHING FIRE—DAMAGE—LIABILITY OF MUNICIPALITY—MISFEASANCE—NON-FEASANCE,

Dawson v. *Bingley Urban District Council* (1911) 2 K.B. 149. By a statute, municipal authorities are required to cause fire plugs to be provided, and to paint or mark on the buildings and walls within the streets, words or marks to denote the situate of such fire plugs. The defendants provided a fire plug and placed on the wall in a street a plate intended to mark its situation, but in fact a line drawn straight across the street from this mark crossed the water main at a distance 6 feet 10 inches distant from the fire plug. A fire having occurred in the plaintiff's premises, the fire brigade was quickly in attendance, but there was considerable delay owing to the inability of the firemen to find the exact position of the fire plug, and as a result the fire caused more damage than it would have done had the fire plug been promptly located. In these circumstances Grantham, J., held that the defendants were guilty of an act of misfeasance and not of non-feasance only, and were therefore liable to make good the extra loss the plaintiff had thereby sustained.

MASTER AND SERVANT—NEGLIGENCE—STATUTORY DUTY.

Watkins v. *The Naval Colliery Co.* (1911) 2 K.B. 162. This action was brought by the widow of a deceased workman of the defendants to recover damages for an alleged breach by the defendants of their statutory duty under the Coal Mines Regulation Act, 1887, by s. 49 of which it is provided: "The following general rules shall be observed so far as reasonably practicable in every mine," and rule 30: "There shall be attached to every machine worked by steam, water or mechanical power, and used for lowering or raising persons, an adequate brake or brakes . . .". In the defendants' mine in which the de-

ceased had worked, there was an engine used for lowering or raising persons in a cage. In August, 1909, a workman of defendants had been killed while being lowered in the cage. Some years before the accident now in question a new brake had been attached to the engine for the purpose of being used with a larger cage than had been theretofore used, and this cage had been used for raising or lowering 20 men at a time. A new manager in June, 1909, gave directions increasing the number to be raised or lowered to 26, and from that time until the accident, two months afterwards, that number had been raised or lowered in the cage. At the time of the accident 27 men were being lowered when a portion of the engine known as the spanner bar, which is part of the reversing gear broke, and the reversing gear failed to act, with the result that the cage, then 32 feet from the bottom of the shaft, fell violently to the bottom; and an empty ascending cage broke away and fell on the top of the cage in which the deceased was. The jury found that the accident was caused by a deficient brake coupled with a defective spanner bar. Pickford, J., who tried the action gave judgment for the plaintiff; but the Court of Appeal (Williams, Farwell, and Kennedy, L.JJ.) reversed his decision on the ground that the statute did not impose an absolute duty to provide an adequate brake for all loads that might be carried in the cage, and that the defendants had sufficiently discharged their statutory duty by providing a brake which was sufficient in the judgment of their expert manager, and the defendants not being guilty of any negligence were therefore not liable.

SHIP—DISTRESSED SEAMAN—SEAMAN LEFT BEHIND AT FOREIGN PORT—INCAPACITY OF SEAMAN FOR DUTY OWING TO VENEREAL DISEASE—MAINTENANCE — SURGICAL ADVICE — MERCHANTS SHIPPING ACT, 1906 (6 EDW. VII. c. 48) ss. 32, 34, 35, 41, 42.

Board of Trade v. *Anglo American Oil Co.* (1911) 2 K.B. 225. This was an action under the Merchants Shipping Act, 1906, to recover from defendant shipowners the cost of board, lodging and conveyance home and surgical expenses of a seaman who had been in the defendants' employ who had been left behind when the defendants' ship left a foreign port, because he was incapacitated from duty owing to his being afflicted with a venereal disease. Scrutton, J., who tried the action held that

under the Act that the defendants were liable for the expense of board and maintenance and conveyance home of the seaman in question but not for any surgical or medical expenses, and that under the Act it is only where the seaman is suffering from any illness not being venereal disease or due to his own wilful act, default, or misbehaviour, that the shipowner is liable for medical attendance.

SHIP—GENERAL AVERAGE—EVIDENCE—ONUS OF PROOF—SEAWORTHINESS.

Lindsay v. *Klein* (1911) A.C. 194 may be briefly noticed. The action was by shipowners to recover from the cargo owners a contribution to general average for damage to the ship and expenses occasioned by its having to go into port and discharge and reload the cargo. The House of Lords (Lord Loreburn, L.C., and Lords Shaw, Kinnear and Dundas), affirming the First Division of the Scotch Court of Session, held that the onus of shewing that the ship was seaworthy at the commencement of the voyage, was on the plaintiffs, and having failed to discharge that onus the action failed.

MASTER AND SERVANT—SLANDER BY SERVANT—LIABILITY OF MASTER FOR SLANDER UTTERED BY SERVANT.

Glasgow v. *Lorimer* (1911) A.C. 209. This was an action brought by the plaintiff against the City of Glasgow to recover damages in respect of a slander by a tax collector, employed by the defendants. The plaintiff alleged that the collector in question went to the plaintiff's house to demand payment of taxes, and she produced a receipt for 7s. 6d., which the collector then declared had been altered from the sum of 4s. 6d. for which it had been made out, and when the plaintiff denied the charge, he threatened to lodge an information with the police authorities, which would result in her being put in gaol for three months for forgery, and that he repeated the slander in the house of a neighbour of the plaintiff. The Scotch Court of Session held that the averments were relevant, but the House of Lords (Lord Loreburn, L.C., and Lords Kinnear, Atkinson, and Shaw) were unanimously of the opinion that they disclosed no cause of action and that the tax collector had no authority from the defendants, express or implied to express any opinion as to the genuineness of the receipt.

ELECTION—INVALID EXERCISE OF POWER—CONDITION OF ACCEPTANCE OF LEGACIES—APPROPRIATE AND REPROBATE.

Pitman v. *Crum Euring* (1911) A.C. 217 is an instance that the law of Scotland is the same as that of England, in that it will not permit an person to accept a benefit under an instrument and at the same time reject other provisions thereof and refuse to renounce every right inconsistent therewith. The facts in this case were that a testator gave the life rent of a fund to his daughter and the fee to her children, "in such proportions . . . and subject to such restrictions, limitations as she may direct," and failing such directions, then equally among them. The daughter by a comprehensive trust disposition and settlement, which was not a good exercise of the power, gave the fund massed with her own estate to her children in life rent and to their children in fee. The children of the daughter claimed the fund in default of appointment, but the House of Lords (Lords Atkinson, Halsbury, Macnaghten, and Shaw), reversing the Scotch Court of Session, held that the children were put to their election between their rights in default of appointment and the benefits conferred by the will, as it was not open to them to accept or reject the will in part.

SALE OF GOODS—AGENT—AUTHORITY OF AGENT TO RECEIVE PAYMENT IN CASH—DIRECTIONS AS TO PAYMENT BY CROSSED CHEQUE—NOTICE AS TO FORM OF RECEIPT.

International Sponge Importers v. *Watt* (1911) A.C. 279. In this case the appellants employed a traveller to sell their goods and he carried with him parcels of sponges for that purpose. When a sale was made, it was his duty to forward to the appellants a sale sheet containing particulars of the sale. The appellants then forwarded to the customer an invoice of goods sold, which was followed by a monthly statement of account. This statement of account contained three notices. 1st. Cheques to be crossed;" 2nd "all cheques to be made payable to International Sponge Importers" and 3rd "no receipt valid unless on the firm's printed form, to be attached hereto." The appellants had for some years dealt with the respondents on this system. In 1905, 1907, and 1908, the traveller sold and delivered to the respondent, three parcels of sponges. In the first and second of these sales he induced the respondents to pay for the sponges by a cheque payable to himself and on the third occasion they paid him £120 in notes and gold. The traveller having no

authority to receive anything except crossed cheques in favour of the appellants, fraudulently appropriated the payments made to him by the respondents and by fraudulent entries in the appellants' books the fraud was concealed from the appellants for some years and the question at issue in the action was—who was to bear the loss? The appellants sought to recover the value of the sponges so delivered from the respondents, and the latter contended that the payments made to the traveller therefor were valid payments, as against the appellants; and the Scotch Court of Session so held, and the House of Lords (Lords Loreburn, L.C., and Lords Atkinson and Shaw), affirmed the decision being of the opinion that the notices above referred to did not contain a sufficient intimation to the respondents that the traveller was not entitled to receive payment in cash, or by cheque payable to himself, and as Lord Loreburn points out that the same conspiracy which cheated the plaintiffs had the effect of misleading the defendants and causing them to act on the supposition that the traveller actually had authority to receive payment in cash or its equivalent.

MINES—"COAL, IRONSTONE, SLATE AND OTHER MINERALS"—FIRE CLAY—MINERAL.

The Caledonian Railway v. *Glenboig Union Fireclay Co.* (1911) A.C. 290. In this case the difficult question as to the meaning of "minerals" was under consideration. By statute "mines of coal, ironstone, slate, and other minerals" are excepted from lands expropriated by railway companies for the purposes of their railway, and the question was whether a bed of fireclay under land expropriated by the appellants for their railway was a mineral within the meaning of the Act. The Scotch Court of Session held that it was, and the House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, Shaw and Robson), affirmed the decision.

BREACH OF CONTRACT—LATE DELIVERY OF GOODS SOLD—MEASURE OF DAMAGES—PURCHASER ONLY ENTITLED TO INDEMNITY AGAINST LOSS.

Werthim v. *Chicoutimi Pulp Co.* (1911) A.C. 301. This was an appeal from Quebec. The action was brought to recover damages for breach of contract to deliver goods at a specific time. The contract provided that the goods were to be delivered between September 1st and November 1st, and the plaintiff

claimed to recover 27s. 6d. a ton, being the difference between 70s., the market price at the post of delivery at the due date, and 42s. 6d., the market price at the same place on the date of actual delivery; it appeared, however, that the plaintiff had subsequently sold the goods at 65s. a ton, involving a loss to him of only 5s. a ton. The Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson, Collins, and Shaw), held that 5s. per ton was all that the plaintiff could recover. This case appears to bear out the view we expressed on this subject ante, p. 281.

DISCRETIONARY POWER TO PROVIDE MAINTENANCE—SEPARATE WILLS—SEPARATE TRUSTEES—DISCRETION—CONTRIBUTION.

Smith v. *Cock* (1911) A.C. 317 was a somewhat unusual case. The appellants as trustees under a will had discretionary power to pay to the testator's daughter £800 a year, the unpaid portion to fall into the residue. A like power was given to the appellant and a respondent as trustees under the will of her sister to pay such sums as the trustees should think fit in and towards her maintenance, the residue of the income of the testatrix's estate to be paid to her nephew, and the corpus to go in equal shares to his children on death. The trustees under the first will paid the daughter £400 a year, but on the death of the testatrix they reduced the allowance to £100 a year, while the trustees of the second will paid from £700 to £800 a year. This action was brought by the nephew and the trustee of his insolvent estate claiming that the daughter's maintenance should be provided by a proportionate contribution from each estate. The Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson, Shaw, Mersey, and Robson), reversed the decision of the High Court of Australia and held that the plaintiffs had no such equity as claimed and there was no common obligation and consequently no right to contribution, inasmuch as the trusts were discretionary and to be exercised by different trustees.

Correspondence

PROMISSORY NOTE IN BLANK—POSITION OF HOLDER IN DUE COURSE.

HUBBERT v. HOME BANK, 20 O.L.R. 651.
RAY v. WILLSON, 2 O.W.N. 1250.

To the Editor, CANADA LAW JOURNAL:

DEAR SIR,—These decisions must be of very great interest and importance to banks and solicitors; but I must confess I cannot understand them; and thought that perhaps you would not object to throwing some light upon them.

We have here two cases, in which we may assume that promissory notes in due and proper form, for all that appears, in the hands of a bonâ fide holder for value, are held to be mere pieces of waste paper, because the maker has signed them in blank, left them with a trusted agent of his own, to be filled up in certain contingencies (which are profound secrets between the maker and his trusted agent) and this trusted agent has violated his trust, and has filled up those notes and put them into circulation. We can assume that the endorsees have no notice of the secret instructions, and we may further assume that all inquiry by him, if he made any inquiry, of the payee or prior holder, would not have made him any wiser, and that he could not by any means whatever have any knowledge of the secret instructions unless he applies for information to the maker himself. This latter course is inconceivable as to hold it necessary would be to destroy the negotiability of bills and notes. Does sec. 32, read with sec. 31, of the Bills of Exchange Act, preclude the endorsee from recovering against the maker?

In this inquiry, we are eliminating the question of the bonâ fides of the endorsee altogether—he is presumed to be in good faith.

Why should the bonâ fide holder of such an instrument be in a different position from one who takes a note which has been made without consideration, or obtained by fraud or duress? So far as the endorsee is concerned, a maker of such a note (in blank) should not be in any better position than the maker of a note without consideration or obtained from him by a fraud —in fact, one would rather be likely to think that a man who signs the form of a blank note is ready to accept all risks of what will happen to it—and properly so. If he trusts the payee

or custodian so implicitly, he ought to be compelled to answer whatever the custodian does with it.

The point, however, which strikes me most forcibly is that in the above cases, the courts, in holding that there was no delivery or issue of the notes, were not referred to sec. 40 of the Act, which provides that as between *immediate parties*, and as regards *remote parties other than holders in due course*, the delivery in order to be effectual, must be under the authority of the party drawing or accepting it, or if conditional, that the condition has been performed.

But, here comes the difference. By sub-sec. 2 of sec. 40, "If the bill is in the hands of a bonâ fide holder, a valid delivery of the bill to him is to be conclusively presumed." This section is not cited in *Ray* v. *Willson*, or in *Home Bank* v. *Hubbert*, and it is intended, no doubt, to preserve to a bonâ fide holder the protection he has always been entitled to. The delivery in both of these cases was, no doubt, in violation of the conditions upon which, as between the maker and his agent, the notes were to be delivered or circulated, but, for the protection of the bonâ fide holder, the valid delivery must be conclusively presumed.

The decisions above mentioned really place such notes upon the same plane as if the maker had signed a note, and put it in a drawer, from where it is stolen, and put in circulation by the thief. Of course, in such a case the maker would not be liable, because he never delivered or issued it, and an endorsee must take the risk of that, as he must of its being a forgery, but in these cases, the maker knew or should have known, that he was putting in the power of his custodian or agent, the power to swindle a bonâ fide endorsee by issuing the note contrary to instructions, and he, the maker, should suffer from the fraud of one whom he has trusted, rather than an innocent holder. It may be that I have not grasped the meaning of the decisions or rather the reasoning of them.

It appears that in *Smith* v. *Prosser* (1907), 2 K.B. 735, the endorsee was put upon inquiry by the fact that the note when offered to him was not complete, and he therefore knew that the custodian had received an incomplete instrument, and that very fact implies that he had some limited authority.

If *Ray* v. *Wilson* had been rested upon the ground that the plaintiff was not a holder without notice, and the other point not dealt with in the way it was, it would not have puzzled the writer so much.

I cannot see how sec. 40 is ever to have any application unless in a case like this.

Yours, J. R.

REPORTS AND NOTES OF CASES.

Province of Ontario.

HIGH COURT OF JUSTICE.

Falconbridge, C.J.K.B., Britton and Riddell, JJ.] [July 19.

BONDY *v.* SANDWICH, WINDSOR AND AMHERSTBURG RY. CO.

Negligence—Duty towards trespasser—Ontario electric railway.

Appeal by the defendant from the judgment of the County Court of the county of Essex, awarding the plaintiff $200 for the loss of his horse, killed by the defendant's car. The defendant is an electric railway incorporated by the Ontario Legislature, and running between Windsor and Amherstburg along the highway and on an additional strip of land purchased from adjoining landowners. The track is partly on the highway and partly on the purchased strip. The horse in question had escaped from its pasture, and was standing upon the railway track, when the defendant's car, coming round a bend, struck the horse and caused its death.

The evidence shewed that as soon as the motorman saw the horse he did everything in his power to stop the car, but the jury found that he could have seen the horse in time to have stopped the car from striking it. There was a bend in the road which, together with the presence of trees on the adjoining land, to some extent obscured the vision.

Held, reversing the County Court, that the horse was a trespasser, and that under the circumstances the motorman was under no obligation to keep a look-out, he having done all in his power to avert the collision after seeing the horse, and the appeal was therefore allowed and the action dismissed with costs.

C. A. Moss, for appellant. *J. H. Rodd,* Windsor, for respondent.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] CHODERKER *v.* HARRISON. [June 13.

Landlord and tenant—Action by sub-tenant for wrongful distress.

Appeal from the judgment of ROBSON, J., noted ante, p. 75, dismissed with costs.

Full Court.] EGGERTSON *v.* NICASTRO. [June 13.

Fraudulent conveyance—27 Eliz. c. 4—Voluntary settlement.

Appeal from judgment of PRENDERGAST, J., noted vol. 46, p. 550, dismissed with costs.

Full Court.] [June 12.

DALZIEL *v.* HOMESEEKERS LAND, ETC., CO.

Vendor and purchaser—Cancellation of agreement of sale—Forfeiture—Repayment of monies paid on account—Damages.

Appeal from decision of ROBSON, J., noted ante, p. 153, allowed with costs.

Held, that, the plaintiff, having deliberately refrained from continuing his monthly payments for over two years and a half because the land had diminished in value and he was in doubt whether it "would do him any good" to pay any more instalments, was not entitled to any equitable relief against the forfeiture provided for by the contract, and, therefore, could not recover the amount he had paid. *Whitla* v. *Riverview,* 19 M.R. 746, distinguished, as in that case, because of the pleadings and the refusal of counsel to raise the point, the question of the purchaser's laches was, in the view of the majority of the Court, not before it for decision.

Hansford, for plaintiff. *Locke,* for defendants.

Full Court.] [June 12.

WINNIPEG OIL CO. *v.* CANADIAN NORTHERN RY. CO.

Railway Act, R.S.C. 1906, *c.* 37, *s.* 298—*Evidence—Fire started by sparks from locomotive—Contributory negligence—Action for injury to land out of the jurisdiction.*

Appeal from decision of PRENDERGAST, J., noted vol. 46, p.

703. The court affirmed the judgment except as to the amount allowed for damage to the building.

Held, that, as the building was part of the land, the title to which had been put in issue and which was in the Province of Saskatchewan, the courts of Manitoba have no jurisdiction to entertain an action for such damages. *Brereton* v. *C.P.R. Co.*, 29 O.R. 57, and *British S.A. Co.* v. *Mocambique* (1893), A.C. 602, followed.

Held, also, that, under s. 298 of the Railway Act, which makes the railway company liable for losses caused by a fire started by a locomotive, "whether guilty of negligence or not," no contributory negligence on the part of the owner, unless it is wanton or such as amounts to fraud in increasing the risk of fire, is available as a defence. *Vaughan* v. *Taff Vale Ry. Co.* 3 H. & N. 743; *Campbell* v. *McGregor*, 29 N.B. 644; *Jaffray* v. *T. G. & B. Ry. Co.*, 23 U.C.C.P. 560; *McLaren* v. *Canada Central*, 32 U.C. C.P. 341; *Bowen* v. *Boston & A.R. Co.*, 61 N.E.R., at p. 142; *Matthews* v. *Missouri Pacific*, 44 S.W.R. 802, and *Matthews* v. *St. Louis & S.F. Ry. Co.*, 24 S.W.R. at p. 602, followed.

Fillmore, for plaintiffs. *Clarke*, K.C., for defendants.

Full Court.] [June 12.

WATSON MANUFACTURING CO. *v.* BOWSER.

Partnership—Discharge of retiring partner by agreement with creditor inferred from course of dealing—Partnership Act.

The plaintiff company was a creditor of a firm composed of the defendant and one McDonald. This firm was dissolved in 1902, McDonald taking over the assets, assuming the liabilities and continuing the business. The plaintiff's manager took part in bringing about these arrangements and the company continued to sell goods and give credit to McDonald and subsequently to McDonald & Simmons. It took renewal notes from McDonald to cover the entire liability of the old partnership and the notes sued on were entered in the bill book as paid by these renewals. The balance due by the firm was charged up to McDonald in the new account opened for him in the books and the plaintiff, while persistently urging McDonald for payment during a period of nearly six years, never asked the defendant for payment, although it held the original notes of McDonald and Bowser now sued on. It sought security for this

debt from McDonald. Payments made by McDonald were credited directly to him in the plaintiff's ledger. Plaintiff allowed one of the notes sued on to become barred by the Statute of Limitations.

Held, that from these acts and conduct of the plaintiffs, there should be inferred an agreement by the plaintiff to discharge the defendant from his liability as a member of the firm and that the case comes within sub-section (*b*) of section 20 of the Partnership Act, R.S.M. 1902, c. 129. *Hart* v. *Alexander*, 7 C. & P. 746, 2 M. & W. 484, followed.

Fillmore, for plaintiff. *Fullerton* and *Foley*, for defendant.

Full Court.] [June 12.

SUTHERLAND *v.* CANADIAN NORTHERN RY. CO.

Limitation of time for commencing action—Injury received while working for railway company—What included in word "railway" as used in s. 306—Railways subject to Dominion legislation—Workmen's Compensation for Injuries Act—Distinction between rights of action arising under the Railway Act and those given by the common law or provincial legislation, as respects the limitation of time for commencing suit.

Held, 1. An injury caused by the defective state of a scaffold being used in the construction of an ice house for the use of a railway company is not one "sustained by reason of the construction or operation of the railway," within the meaning of s. 306 of the Railway Act, R.S.C. 1906, c. 37, and therefore an action to recover damages for such injury is not barred by that section by the lapse of a year.

Ryckman v. *Hamilton, etc., Ry. Co.*, 10 O.L.R. 419, and *Robinson* v. *C.N.R. Co.*, 43 S.C.R. 387, followed.

2. The limitation of time prescribed by section 306 relates only to actions against railway companies provided for in the Railway Act itself, and was not intended to apply to actions the rights of which exist at common law or under provincial legislation.

3. Dominion railways are subject to provincial legislation on the relations between master and servant, such as the Workmen's Compensation for Injuries Act, unless the field has been covered by Dominion legislation ancillary to Dominion legislation respecting railways under the jurisdiction of Parliament, and

sub-section 4 of section 306 qualifies its main clause and excludes its operation where the injury complained of comes within the jurisdiction of, and is specially dealt with by the laws of, the province in which it takes place, provided such laws do not encroach upon Dominion powers. *C.P.R. Co.* v. *Roy* (1902), A.C. 220, distinguished. *Canada Southern* v. *Jackson*, 17 S.C.R. at 325, followed.

Per CAMERON, J.A.:—Although the definition of the word, "railway" in par. (21) of s. 2 of the Railway Act, would seem to include the icehouse in question, yet that is subject to the qualifying provision "unless the context otherwise requires," at the beginning of s. 2, and the context in s. 306 does otherwise require.

McMurray and *Davidson*, for plaintiff. *Clarke*, K.C., for defendant.

Full Court.] [June 22.

BANK OF BRITISH NORTH AMERICA *v.* MCCOMB.

Bill of exchange and promissory notes—Holder in due course—Bills of Exchange Act—Consideration — Unfair dealing — Setting aside transaction for fraud or illegality—Recovery of money paid under protest.

Held, 1. The mere existence of a liability of a customer to a bank on a promissory note not yet due is not a sufficient consideration, under s. 53 of the Bills of Exchange Act, for the transfer by the customer to the bank of the promissory note of a third party as collateral security so as to constitute the bank the holder in due course of such promissory note or to give the bank a better title to it than the customer had as against the maker, unless there is evidence that such note was transferred pursuant to a previous agreement to give security. *Canadian Bank of Commerce* v. *Waite*, 1 Alta. 68, followed. *Currie* v. *Misa*, L.R. 10 Ex. 153, and *MacLean* v. *Clydesdale Banking Co.*, 9 A.C. 95, distinguished, on the ground that the debts there secured were overdue at the time the collaterals were received.

2. Where a promissory note has been given in respect of an indebtedness incurred, that indebtedness will not furnish a consideration for another simple contract made during the currency of the note, the original consideration having been merged in the note. *Hopkins* v. *Logan*, 5 M. & W. 241; *Roscorla* v. *Thomas*, 3 Q.B. 234, and *Kaye* v. *Dutton*, 7 M. & G. 815, followed.

The defendant was a young man without experience and of little business capacity and without independent advice when he was induced by one Bartlett to enter into a very disadvantageous bargain for the sale of his land which he could not carry out. Bartlett then made false representations as to the defendant's liability to him for damages and, assisted by his own solicitor, succeeded in procuring from the defendant the promissory note for $1,015 sued on in settlement of the supposed damages. He then indorsed over this note to the plaintiffs to be held as collateral security for a note of his own which was then current.

Held, that the issue of the note was affected with fraud or illegality within the meaning of s. 58 of the Bills of Exchange Act, that the dealings between Bartlett and the defendant were unfair and should be set aside, and that the plaintiffs, not being holders in due course and having no better title to the note than Bartlett, could not recover in an action against the defendant upon it. *Evans* v. *Llewellin,* 1 Cox 333; *Clark* v. *Malpas,* 4 De G. F. & J. 401; *Baker* v. *Monk,* 4 De G. J. & S. 388; *Fry* v. *Lane,* 40 Ch. D. 322; *Slator* v. *Nolan,* Ir. R. 11 Eq. 367, and *Waters* v. *Donnelly,* 9 O.R. 391, followed.

Held, also, that the defendant was entitled to recover from the plaintiffs the amount which he had paid them under protest to prevent the seizure and sale of his gods under a chattel mortgage which he had been induced to give to Bartlett to secure the note in question, and which Bartlett had assigned to the plaintiffs.

Curran, K.C., for plaintiffs. *Kilgour,* for defendant.

Full Court.] JOHNSON *v.* HENRY. [July 5.

Vendors and purchasers—Return of payments when vendor unable to make title—Payments in shares which afterwards became worthless—Right of vendor to return the shares instead of the amount at which they had been valued in the exchange —Estoppel by recovery of judgment.

The defendant sold 18 parcels of land to the plaintiff at an average price of $1,040 each and accepted shares in a company of the par value of $6,400 in lieu of the first payment to be made under the agreements. Plaintiff paid in cash by way of second instalment $794.56. Defendant recovered judgment against

plaintiff for the third instalment due on twelve of the agreements, and plaintiff paid the judgment. He afterwards discovered that defendant was unable to make title under thirteen of the agreements and brought this action.

Shortly after defendant acquired the shares, the company failed and the shares became worthless.

Held, 1. Plaintiff was entitled to recover back the cash he had paid on the lands for which defendant could not make title, including the amount paid to satisfy the judgment referred to, though not the costs of that action.

2. The said judgment was not, under the circumstances, an estoppel against the plaintiff, as he was ignorant of his rights when he failed to defend the action. *Jackson* v. *Scott*, 1 O.L.R. 488, followed.

3. RICHARDS, J.A., dissenting. In respect of the first payments, defendant should only be ordered to transfer back the shares he had received from the plaintiff and was not liable for the amount in cash at which he had taken them over. *Snider* v. *Webster*, 20 M.R. 562, distinguished.

Per RICHARDS, J.A.:—The defendant should be ordered to pay in cash what the shares were worth at the time he received them, and there should be a reference to ascertain that value.

Galt, K.C., and *C. S. Tupper*, for plaintiff. *Symington*, for defendant.

Full Court.] [July 5.

COX *v.* CANADIAN BANK OF COMMERCE.

Bills of exchange and promissory notes—Holder in due course—Consideration.

Appeal from decision of Mathers, C.J., noted ante, p. 236, allowed with costs, RICHARDS, J.A., dissenting, and judgment given for the defendants for payment by the plaintiffs of the amount of the note in question and costs of the action and counterclaim.

The court agreed with all the findings of fact of the trial judge and all his conclusions of law except his holding that, because the overdrafts and new discounts had been paid off, therefore there was no consideration left.

The note had been pledged as collateral to the then existing indebtedness, there was a good consideration given for such pledging and, therefore, the bank was entitled to hold the note as

against the original indebtedness, although the subsequent advances had been paid off. *Lloyd's Bank* v. *Cook* (1907), 1 K.B. 794, and *Brockelsbury* v. *Temperance P.B. Co.* (1895), A.C. 173, followed.

Coyne, for plaintiffs. *Dennistoun*, K.C., and *Craig*, for defendants.

KING'S BENCH.

Mathers, C.J.] DAVIS *v.* BARLOW. [June 12.

Contempt of court—Injunction, disobedience of—Notice of injunction by telephone and telegraph—Agent—Company—Contempt committed by its officer.

The defendant, as returning officer at an election of a member of the Provincial Legislature, had deposited his return with the Canadian Northern Express Co. at Neepawa, for transmission to the clerk of the Executive Council at Winnipeg. Later in the same day a judge of this court made an interim injunction order restraining the defendant, his servants and agents from making the return. The defendant was served with the order in sufficient time before the actual delivery to enable him to instruct the express company by telegraph or telephone not to deliver the return, but made no effort to do so, saying that he supposed he could not stop the delivery.

Held, that the defendant was bound to the utmost diligence in carrying out the order and was guilty of contempt of court, for which he was ordered to pay the costs of the motion. *Harding* v. *Tingley*, 12 W.R. 684, followed.

The officer of the express company whose duty it was to attend to the delivery of parcels was notified of the issue of the injunction both by telephone and telegraph the day it was issued, but nevertheless delivered the return the next morning shortly before the order itself was served upon him.

Held, that, the express company was guilty of a serious contempt of court and could not excuse itself by shewing that the disobedience was an act of its officer done without instructions or even in breach of duty. *Stancomb* v. *Trowbridge Urban Council* (1910), 2 Ch. 184, and *Rantzen* v. *Rothschilds*, 13 L.T. 399, followed.

His Lordship fined the express company $1,000.

A. V. Hudson, for plaintiff. *Dennistoun*, K.C., for defendant. *Clarke*, K.C., for the express company.

Full Court.] GREEN *v.* DENNISON. [June 12.

Sale of goods—Repudiation of contract by buyer—Failure of seller to prepay freight as agreed—Damages for refusal to accept—Duty of seller in making re-sale of the goods.

When the purchaser of an article has absolutely refused to accept it because he had changed his mind about buying it, he cannot avoid paying damages on the ground that the seller was to prepay the freight and had not done so. *Braithwaite* v. *Foreign Hardwood Co.* (1905), 2 K.B. 543, followed.

When the seller of the rejected goods has re-sold them by auction fairly conducted and reasonably advertised, due notice having been given to the buyer, he is entitled to recover the difference between the contract price and the net amount realized, and he is not required to exercise the utmost amount of diligence and skill and the most accurate judgment in an endeavour to save the wrong-doer from loss. *Dunkirk Colliery Co.* v. *Lever*, 41 L.T. per James, L.J., at p. 635, followed.

The expenses of storing the article in question in this case, a cab, for an unnecessary length of time and of sending it from Brandon to Winnipeg to be sold were disallowed. RICHARDS, J.A., agreed with the trial Judge in holding that the plaintiff could and should have sold the cab at a higher price than that obtained at the auction and should therefore be charged with such higher price as against the contract price.

Galt, K.C., and *J. S. Tupper*, for plaintiff. *Kilgour*, for defendants.

Macdonald, J.] KING *v.* STARK. [June 21.

Criminal law—Criminal Code, s. 781—Bawdy house—Excessive fine—Summary trial of indictable offence.

A conviction adjuding a fine of $100 without any mention of costs upon the summary trial before a police magistrate of a charge of keeping a common bawdy house sufficiently complies with s. 781 of the Criminal Code, which provides that the magistrate may condemn the party convicted to pay a fine not exceeding, with the costs of the case, one hundred dollars. *Regina* v. *Cyr*, 12 Pr. R. 24, distinguished.

Hagel, for prisoner. *Patterson*, K.C., D.A.-G., for the Crown.

Robson, J.] CAISBERY *v.* STEWART. [June 27.

Description of land, sufficiency of—Statute of Frauds—Evidence.

A written offer, signed by the defendant in Manitoba, to purchase from the plaintiff land described only as N½ 23-4-3 E, and accepted by the plaintiff, sufficiently describes the land to satisfy the Statute of Frauds. *Abell* v. *McLaren*, 13 M.R. 463, followed.

The same writing contained an offer to convey land described as 6 lots in Winnipeg listed with J. P. Bucknam & Son.

Held, that parol evidence was admissible to ascertain the identity of these lots, and, that being proved, the Statute of Frauds was sufficiently complied with. *Shardlow* v. *Cottrell*, 20 Ch. D. 90, followed.

Hoskin, K.C., and *Coulter*, for plaintiff. *Haggart*, K.C., for defendant.

Robson, J.] VASSAR SCHOOL DISTRICT *v.* SPICER. [June 30.

Contract—Ratification—Principal and agent—Adoption of acts of agent—Effect of taking possession of building—Corporation—Money advanced by officer for corporation expenses.

On the failure of the contractor to complete the erection of a school for the plaintiff school district, the defendant as secretary-treasurer and another trustee, without the authorization of formal trustee meetings, expended certain moneys of the corporation in completing the building which was afterwards taken over by the corporation and used as a school house. There were only three trustees and the third was not in the province that season.

Held, 1. There had been such an adoption by the plaintiff corporation of the acts of the defendant and the other trustee, that the defendant was entitled to credit in his accounts as treasurer for the moneys so paid out. *French* v. *Backhouse*, 5 Burr. 2728; *Sentance* v. *Hawley*, 13 C.B.N.S. 458, and *Bristow* v. *Whitmore*, 31 L.J.N.S. ch. 466, followed.

2. As the school building was built upon land which was not the property of the school district, the rule that an employer does not, as against a contractor, accept the work done in the erection of a building merely by re-occupying his own land, did not apply.

A. C. Campbell, for plaintiff. *Trueman*, for defendant.

Metcalfe, J.] RE LANDSBOROUGH. [July 12.

Prohibition—Jurisdiction of judge in chambers.

A judge in chambers has no jurisdiction to entertain a motion for a prohibition to a County Court judge. *Watson* v. *Lillico*, 6 M.R. 59, followed.

Bonnar, K.C., for applicant. *Tench* and *Devaux*, for Landsborough.

Robson, J.] NOBLE v. CAMPBELL. [July 11.

Mortgage — Foreclosure under Real Property Act — Right of action against mortgagor on covenant for payment—Liability of transferee from mortgagor to indemnify him against mortgagee's claim for payment.

Held, 1. Under sections 114 and 126 of the Real Property Act, R.S.M. 1902, c. 148, as they stood prior to the amendments of the Act by 1 George V. c. 49, a mortgagee, even after foreclosure under the Act, may, if he still retains the property, sue the mortgagor on his covenant for payment; and therefore, in such a case, the mortgagor, if he has transferred the property, may call upon his purchaser to pay the mortgage money under the implied covenant to indemnify him set forth in section 89 of the Act. *Williams* v. *Box*, 44 S.C.R. 1; *Platt* v. *Ashbridge*, 12 Gr. at p. 106; *Campbell* v. *Holyland*, 7 Ch. D. 166, and *Blunt* v. *Marsh*, 1 Terr. L.R. 126, followed.

2. Payment by the plaintiff in such a case is not a condition precedent to his right of action on the purchaser's obligation to indemnify, but the purchaser may be ordered to bring the money into court to be paid to the mortgagee. *Cullen* v. *Rinn*, 5 M.R. 8, and *Mewburn* v. *MacKelcan*, 19 A.R. 729, followed.

Haggart, K.C., and *Sullivan*, for plaintiff. *Hoskin*, K.C., and *Huggard*, for defendant Campbell. *Hull*, for the mortgagee.

Province of British Columbia.

COURT OF APPEAL.

Full Court.] [June 20.

KELLETT *v.* BRITISH COLUMBIA MARINE RY. CO.

Master and servant—Injury to servant in the course of his employment.

Plaintiff, a workman in the defendants' employment, lost the sight of an eye through being struck with a splinter from the

iron ring of a wooden hammer used in caulking operations. The condition of the tool was brought by plaintiff to the foreman's notice immediately before the accident, not in the sense of its being dangerous, as similar tools in similar condition were often used, but as to its condition to do the work effectively. The foreman directed plaintiff, as time was important, to try to do the work with the hammer, and the accident occcurred. There was no question of the foreman's competence, nor that the tool as supplied by the employers was defective or dangerous.

Held, on appeal, affirming the judgment of HUNTER, C.J.B.C., setting aside the verdict of the jury in favour of the plaintiff, that there had been no negligence on the part of the defendants; that if there was any negligence it was on the part of the foreman, a fellow servant, and it was shewn that he was a competent person for the posltion.

Aikman, for plaintiff. *Harold Robertson*, for defendant company.

Full Court.] [June 20.

TAYLOR *v.* BRITISH COLUMBIA ELECTRIC RY. CO.

Damages—Assessment of under separate heads—Excessive verdict—New trial.

Following *Victorian Railways Commissioners* v. *Coultas*, 13 App. Cas. 222, a jury should not be asked to assess separately damages resulting from shock caused by blows and those resulting from bodily injury independently of nervous shock. Remarks per IRVING, J.A., as to cases in which damages were so assessed.

In this case a new trial was ordered (IRVING, J.A., dissenting) on the ground that the damages awarded were excessive.

L. G. McPhillips, K.C., for appellant (defendant) company. *McCrossan* and *Harper*, for respondent (plaintiff).

Full Court.] [June 21.

RATHOM *v.* CALWELL AND CALWELL.

Vendor and purchaser—Agreement for sale of land—Interim receipt—Specific performance—Statute of Frauds—Memorandum within—Names of parties—Agent—Authority to make contract.

In a real estate transaction a firm of brokers arranged terms with the vendor, and on themselves paying a deposit of $50, pro-

cured the following receipt: "Received from Marriott & Fellows the sum of fifty dollars, being deposit on account of purchase of lot numbered 799 in block 10 in section 18, Victoria, at the price or sum of six thousand dollars ($6,000) two thousand five hundred on the execution of agreements, and the balance as follows: Assume mortgage for $3,500 (three thousand five hundred) at 7½ per cent. interest. Five per cent. commission to be paid to Marriott & Fellows when sale is completed. Taxes, insurance, rent, etc., to be adjusted to date of sale. Mrs. Minnie Calwell, wife of Hugh E. Calwell."

Held, on appeal, IRVING, J.A., dissenting, that this was not a sufficient memorandum within the Statute of Frauds so as to entitle the purchaser to specific performance, as the name of the purchaser did not appear, nor was there any evidence in it by which to identify the purchaser.

Davis, K.C., and *Davie*, for appellants. *Maclean*, K.C., for respondent.

Bench and Bar.

JUDICIAL APPOINTMENTS.

William Seton Gordon, Counsellor at law, to be a Commissioner for taking affidavits in the city of New York, for use in the courts of Ontario.

Evaristo Brassard of the City of Montreal, advocate, to be a Commissioner for same purpose. Gazetted, July 1, 1911.

United States Decisions.

BANKS.—A bank which accepts a deposit of money needed by the depositor for a special purpose, under the agreement that it will pay the amount when needed for that purpose, is held in Smith v. Sanborn State Bank (Iowa) 30 L.R.A. (N.S.) 517, to have no right to apply it upon the depositor's general indebtedness to it.

BILLS AND NOTES.—A note which, on its face, is subject to the terms of a contract between maker and payee, is held in *Klots Throwing Co.* v. *Manufacturers' Commercial Co.* (C.C.A. 2d C.) 30 L.R.A. (N.S.) 40, not to be negotiable.

CARRIERS.—A passenger who accepts from a carrier's agent a ticket for interstate passage at a through rate which, under the rules of the Commission, does not allow stopover privileges, is held in *Melody* v. *Great Northern R. Co.* (S.D.) 30 L.R.A. (N.S.) 568, not to be entitled to hold the carrier liable in damages for his expulsion from the train in case he attempts to exercise such privileges, although the marks necessary to shew the limited character of the ticket are not placed upon it.

That no recovery can be had for the death of one thrown by a jerk from the top of a car, on which he was riding in preference to riding with the crowd within, in the absence of anything to shew that the jerk was so violent as to shew want of proper care in the operation of the train, is declared in *Patterson* v. *Louisville & N. R. Co.* (Ky.) 30 L.R.A. (N.S.) 425.

That it is not negligence per se for a passenger to ride upon the step of the platform of an electric street railway car is declared in *Trussell* v. *Morris County Traction Co.* (N.J.) 30 L.R.A. (N.S.) 351.

That one injured by attempting to alight from a street car moving at the rate of 6 miles an hour was a foreigner, recently arrived in this country, and that he did not understand English, and was inexperienced in street car travel, but had seen other passengers leave moving cars, is held in *Fosnes* v. *Duluth Street R. Co.* (Wis.) 30 L.R.A. (N.S.) 270, not to relieve him from the charge of contributory negligence in making the attempt.

CONTRACTS.—A contract by a manufacturer of dishes to fill an order for a certain number, bearing the monogram of the purchaser, is held in *Re Gies* (Mich.) 30 L.R.A. (N.S.) 318, to constitute a contract for work and labour, not within the statute of frauds, where the value of the undecorated dish is a small part of the final cost, although compliance with the contract will result in a sale of the dishes.

A contract to secure evidence of a given state of facts, which will permit the winning of a lawsuit, is held in *Neece* v. *Joseph* (Ark.) 30 L.R.A. (N.S.) 278, to be void as against public policy.

Agents of a foreign corporation which was organized for legitimate business purposes, and has fully complied with the laws entitling it to do business in the state, are held in *International Harvester Co.* v. *Smith* (Mich.) 30 L.R.A. (N.S.) 580, to have no right to defeat an action by it to compel them to pay over money belonging to it, arising from goods sold and collections made on the theory that it is a trust or monopoly, either at common law or under a statute making illegal contracts in re-

straint of trade or commerce, although the statute denies to a foreign corporation violating its provisions, the right to do business in the state.

DAMAGES.—The damages to be allowed for the enforced idleness of a mill because of a carrier's neglect to transport machinery to it are held in *Harper Furniture Co.* v. *Southern Exp. Co.* (N.C.) 30 L.R.A. (N.S.) 483, not to include lost profits.

MASTER AND SERVANT.—That a street car company is not, although it is disobeying a statute in using a car without a vestibule in front in the winter time, liable for injury to a conductor who falls from the running board while attempting to raise a side curtain to collect a fare, is declared in *Rich* v. *Asheville Electric Co.* (N.C.) 30 L.R.A. (N.S.) 428, since the injury was held not to be one which should have been anticipated, and was therefore not the proximate cause of the wrongful act.

A telephone company sending a man to straighten an angle pole which is leaning because of the strain of the wires is held in *Willis* v. *Plymouth & C. Teleph. Exch. Co.* (N.H.) 30 L.R.A. (N.S.) 477, to owe him the duty of doing what an ordinary man would do under the circumstances to ascertain whether or not the pole was originally set the proper depth into the ground, or whether it had pulled out, it being unsafe to climb a leaning pole subject to the angle strain if it is not sufficiently deep in the ground.

A servant who repeatedly violates different rules of the master, and disobeys different express orders, is held in Robbins v. *Lewiston*, A. & W. Street R. Co. (Me.) 30 L.R.A. (N.S.) 109, to be legally incompetent; and if the master continues to employ him with knowledge of such incompetence, it is held that he will be liable for injuries to other employees through such disobedience of orders.

The operation of a machine in a factory is held in *Lowe Mfg. Co.* v. *Payne*, (Ala.) 30 L.R.A. (N.S.) 436, not to be justified in obeying an order of his boss to clean the machine while it is in motion, if he knows the operation to be dangerous, so as to be entitled to hold his master liable for an injury resulting from the attempt.

The electrician and engineer of an electric light company are held in *Shank* v. *Edison Elec. Illuminating Co.* (Pa.) 30 L.R.A. (N.S.) 46, to be fellow servants of a lineman, where they exercise no supervisory power over him or the work, so that the company is not liable for their negligence in turning on the current while he is in a position of danger, so as to cause injury to him.

Flotsam and Jetsam.

Dillon on Municipal Corporations:—

A fifth revised and greatly enlarged edition of "Dillon on Municipal Corporations" is announced for immediate publication by Little, Brown & Co., Boston. It was over 45 years ago that the author, then a Judge of the Supreme Court of Iowa, commenced the preparation of this authoritative treatise, and the work appeared in one volume in 1872. Because of the growth of the law on the subject the new fifth edition will appear in five octavo volumes, containing 2,034,878 words. Judge Dillon, after serving as Chief Justice of the Iowa Supreme Court, Judge of the United States Circuit Court, President of the American Bar Association, and professor in the Columbia University Law School, is now an eminent railroad attorney in New York City.

A shoe company in St. Louis is giving some trouble to a judge. The company sues a railway company for the loss of 449 left shoes which were destroyed in a fire in the railroad warehouses. The shoe company wants $965.37 for the loss, while the railway company contends the shoes were valueless because the right shoes were missing. The shoe company admits that a left shoe alone has no value as an article of wear except to a one-legged man, but it insists that the shoes burned were used by a travelling salesman as samples and that the right shoes were in the possession of another salesman. With the loss of the left shoes they declare they have lost the entire 449 pairs. The travelling salesman testified that his samples, as he carried them, possessed no market value, he having only the left shoe of the many kinds in his three trunks, and added that to have a right shoe made to match the left would cost more than the original pair would have sold for. The judge said that in a long judicial experience he had never heard of such a case before, and would therefore take it from the jury for examination of the law. He further stated that if the plaintiff could recover for 449 pairs of shoes lost in Florida, and the right-foot shoes were similarly destroyed in some other state, the plaintiff might recover for 898 pairs of shoes.

Two Grumblers:—"MacMahon, J.:—I give a grumbling assent. Teetzel, J.:—I agree." See McKeown v. Toronto R.W. Co., 19 O.L.R. 361, 369.—*Law Notes.*

Canada Law Journal.

VOL. XLVII. TORONTO, AUGUST. Nos. 15 & 16.

THE MARRIAGE LAWS AND THE COUNCIL OF TRENT.

Recent events have drawn public attention to a matter of profound national importance, namely the law as to marriage and divorce, the moving cause being the enforcement by what is known as the "Ne Temere" decree of one of the decrees of the Council of Trent concerning clandestine marriages, and some cases which have arisen where the provisions of that decree have been invoked for the purpose of questioning the validity of marriages which, but for that pronouncement, could not have been questioned.

The Council of Trent dates back to 1564. That part of its proceedings which affect the present situation was the decree that, "those who attempt to contract marriage otherwise than in the presence of their parish priest or of the ordinary, and in the presence of two or three witnesses, become thereby incapable of marrying validly, since the Council declares that all such contracts are null and void."

The reason given for the above was that it was desirable to make provision against the rash celebration of secret marriages.

So far as Canada is concerned this was a dead letter until August 2, 1907, when the present Pope issued a decree on the subject which contained amongst others, the following provisions:—

"Only those marriages are valid which are contracted before the parish priest delegated by either of these, and at least two witnesses, in accordance with the rules laid down in the following articles."

"The above laws are binding on all persons baptised in the Catholic Church, and on those who have been converted to it

from heresy or schism (even when either the latter or the former have fallen away afterwards from the Church) in all cases of betrothal or marriage."

"The same laws are binding also, on such Catholics, if they contract betrothal or marriage with non-Catholics, baptised or unbaptised even after a dispensation has been ordained from the impediment mixtae religionis or disparitatis cultus; unless the Holy See have decreed otherwise for some particular place or region."

"Non-Catholics, whether baptised or unbaptised, who contract among themselves are nowhere bound to observe the Catholic form of betrothal or marriage."

These provisions (with others which are not important in this connection) were not to affect marriages performed before Easter Sunday, 1908.

The case which brought this decree and its results prominently before the public in Canada was the suit of *Hebert* v. *Clouatre*. The facts connected with this suit were shortly that a man by the name of Hebert, a Roman Catholic, was on July 14, 1908, married to a woman, also a Roman Catholic, by a Methodist minister in Montreal. This minister was authorized by the statute law of Quebec to perform marriage ceremonies. Mr. and Mrs. Hebert lived together as man and wife and had one child. It appears that the husband subsequently for some reason which does not appear applied to the ecclesiastical authorities of his church to have the union dissolved on the sole grounds that it was not solemnized by a priest. The civil suit which followed came before Mr. Justice Laurendeau of the Superior Court of the Province of Quebec. He decided that the ecclesiastical authorities having declared that the marriage tie so solemnized between the parties was null and void, the plaintiff was entitled to have the Superior Court give that declaration full force and effect from a civil point of view.

This judgment is not without precedent, but fortunately it is not without dissent on the Bench. In *Larameé* v. *Evans*, 24 L.C.J. 235, Papineau, J., on demurrer, held as follows:—"According to the jurisprudence of the country the sentence

of the Roman Catholic Bishop, regularly pronounced and de-deciding as to the validity or nullity of the spiritual and religious tie of marriage between Roman Catholics, can and ought to be recognized by the Superior Court."

In the same case in 25 L.C.J. 261, Jette, J., at the trial decided that before pronouncing on the validity of such a marriage, the Superior Court ought to refer the case to the ordinary of the diocese in order that he might pronounce previously the nullity of the marriage and its dissolution, if there be reason for it, saving the right of the Superior Court afterwards to adjudge as to the civil effects of the marriage tie.

To understand completely the meaning of these adjudications it is necessary to realize that, to the Roman Catholic, marriage is a sacrament and a spiritual bond. Its civil effects, that is those civil rights and obligations which result from the marriage (such as, in Quebec, the amount of the marriage portion, the right of succession, heritage and legitimacy) are regarded as wholly collateral affairs. They can be adjudged of by the Court because, and only to the extent to which they are separable from the substance of the contract, that is the sacrament.

It would seem naturally to follow from this conception of marriage, that where the Church, as in this country, is entirely free and separate from the State, the civil authority would have no right either to establish invalidating impediments to the sacrament of marriage, at least between Christians, nor to grant dispensations from impediments established by the Church, any more than it can effect the sacrament of the marriage itself. To put it more simply, the state cannot make laws concerning marriage itself, but only concerning the civil effects which flow from it. This was the view promulgated by Archbishop Bruchesi, head of the Roman Catholic church in the diocese of Montreal, in a pastoral quoted in the case of *Delpit* v. *Cote* (1901) 21 Q.O.R. 338.

The opposition to this view is ably maintained in *Connolly* v. *Woolrich*, 11 L.C.J. 197, by Mr. Justice Monk and in the case just cited of *Delpit* v. *Cote*, by Mr. Justice Archibald.

It is to be observed that in the *Hebert* case the court gave effect to an ecclesiastical decree dissolving the marriage tie, and in the *Larameé* case the Court referred the matter to the Bishop to pronounce the nullity of the marriage and reserved only the right to pronounce such decree as would give effect to that decision in regard to the civil rights affected by it.

This brings into strong relief the Roman Catholic aspect of marriage as solely a religious and not a civil tie. Archbishop Bruchesi puts it that the state can only legislate and adjudge "provided that its laws do not affect the marriage tie, neither that which necessarily concerns that tie."

But while this is unquestionably the doctrine of the Church of Rome, acted upon by its ecclesiastical authorities, the important question remains, has it become and is it the law of the Province of Quebec, and under what authority do the bishops of that denomination of Christians acquire jurisdiction to nullify marriages solemnized pursuant to Article 128 of the Quebec Code, which enacts that "marriage must be solemnized openly, by a competent officer recognized by law."

It would be to beg the question in issue to assume that the marriage tie is entirely a sacrament of religious institution and that only the effects of it are civil, e.g., the right to dower, to an estate by the courtesy and the legitimacy of the children. That view is certainly contrary to the belief prevailing in Ontario.

The case in hand is a decision that a marriage between two Roman Catholics is void because not celebrated by their own curé and in their church. If the status obtained by a marriage of Roman Catholics is an ecclesiastical one only and not a civil one then the ecclesiastical courts, if existent and legal, may well have jurisdiction, if conferred on them by their church, over its members and their rights. But, if marriage is a civil contract, though sanctioned by religious ceremonies, then no ecclesiastical court could dissolve it unless expressly empowered so to do by civil authority. Blackstone (Vol. 1, p. 433), states that "Our law considers marriage in no other light than as a civil contract." Lord Hardwicke's Act, 26 Geo. II. c. 33, which

was the law of England at the time of the cession of Canada, expressly enacts (sec. 18) that the Act did not extend "to any marriages solemnized beyond the seas."

While in England therefore, pursuant to that statute, marriage could only be solemnized by a clerk in holy orders, yet that part of the law did not extend to this country, and was not introduced here, but rather the common law which existed prior to that enactment. It is clear that marriage under the common law of England was a contract made per verba in presenti, that is in words of the present tense followed by co-habitation, and that before Lord Hardwicke's Act it was totally a civil contract: *Dalrymple* v. *Dalrymple,* 2 Hagg. 54; *Reg.* v. *Millis,* 10 Cl. & F. 534, *Beamish* v. *Beamish,* 8 Jur. 781, *Latour* v. *Teesdale,* 8 Taunton 830. And, as pointed out by Mr. Vice-Chancellor Proudfoot, the English Ecclesiastical Courts, having jurisdiction derived from the civil power and not from the church, could decree dissolution of the marriage, even though it were a civil contract, where legal disability existed.

Archbishop Bruchesi while insisting strongly upon the sacramental character of marriage, apparently limits this characteristic to marriages between those of his own communion. To quote from his own pastoral again: "In order that a marriage may be valid between two Catholics in the limits where the Council of Trent has been published, the presence of the proper priest and two witnesses are necessary; consequently the marriage of two Catholics before a civil officer or a Protestant minister is null. By virtue of the constitution of the pontiffs there are countries, and the Province of Quebec is of the number, where in spite of the promulgation of the Council of Trent, we are to consider as valid marriages celebrated clandestinely between two parties, one being a Catholic and the other a baptised non-catholic. The marriage of a Catholic and a baptised Protestant, or vice versa, celebrated before a Protestant minister, although gravely illicit and calling down the censure of the church, is, however, a marriage contracted in a valid manner even in the eyes of the church herself. Once consummated this marriage

cannot be broken by any earthly power, death alone rendering liberty to the party surviving."

A most interesting and complex question relates to the effect of the conquest, the articles of capitulation and the treaty of cession in 1763 upon the common law existing in Quebec, and whether the common law of England displaced it. But it is unnecessary to enter upon that field of enquiry because Mr. Justice Jettè admits that as a matter of law the old French law as to marriage would be superseded and made obsolete by the institutions of the conqueror. But he relies upon the fact that Roman Catholics were permitted by the Treaty of Paris the free exercise of their religion, and that, as the old institutions relating to matrimony formed part of the exercise of their religion, they were reserved to their jurisdiction. But that free exercise of religion, even if it included the formalities for the celebration of marriage in Roman Catholic churches, would not in any way prevent its adherents of that church, if they so desired, from taking advantage of the more liberal rules laid down by the State for their fellow subjects who were not Roman Catholics. And certainly it could not be contended that the laws of Lower Canada, which were continued, included those which would compel Roman Catholics to conform to that religion, when at that very time the exercise of that religion in England was strictly prohibited. Hence the expression in the treaty of 1763, "so far as the laws of England permitted."

In addition to this the power of dispensation in England was vested in the King and exercised by the Archbishop of Canterbury under a statute delegating it to him (25 Henry VIII. c. 21). To assume that in Quebec after the cession the power still remained in the French King or in the Pope or his bishops would be "contrary to the prerogative of the British Sovereign to issue such dispensations," to quote Lord Stowell in *Ruding* v. *Smith,* 2 Hagg. 378, a case in which it was argued that, as under the articles of capitulation of Cape Colony it was provided that "the inhabitants shall preserve the prerogatives they enjoy at present," dispensations from the publication of banns must be had from the States of Holland.

But when the Civil Code, adopted in Quebec in 1866, is examined it contains enough to indicate that, even if it were true up to that time the ancient law permitted the annulment of the sacrament of marriage by the Roman Catholic ecclesiastical authority, such a right has been done away with. In addition to this, it is quite clear that, even if the French law at the conquest and cession preserved its vitality, the enforcement of it by courts or authorities, whether civil or ecclesiastical, must reside in the courts and authorities which received their power from the King of England, whose supremacy was explicitly acknowledged by the treaty. The authority of the Pope disappeared and the power of courts established by the French King necessarily ceased at the cession in the conquered provinces.

In the *Guibord case, Brown* v. *Cure de Montreal*, L.R. 6 P.C. 157, Mr. Mathews, Q.C., counsel for the Roman Catholic Church, arguendo, said: "The old ecclesiastical law of France cannot apply to Canada after the conquest. The root of it was in the ecclesiastical jurisdiction and supremacy of the Church of Rome;" and Mr. Westlake, K.C., his associate, said: "The ecclesiastical law existing among members of the Roman Catholic body is no longer, since the cession, the law of the land in any respect whatever, it is the law existing among them solely by contract." And in the judgment (p. 211) it is stated that, "It is no doubt true . . . that there are now in Canada no regular ecclesiastical courts such as existed and were recognized by the state when the province formed part of the dominions of France." Hence no ecclesiastical authority could validly adjudicate upon the status of couples united under civil authority, nor indeed upon any other aspect of marriage tie than that of a sacramental one, if that can, in law, exist apart from the civil contract.

The Civil Code, the present law of Quebec, is copied largely from the Code Napoleon and is explicit as to the formalities to be observed in marriages and as to the rights of the parties to a marriage to seek its annulment. By Article 128 it is provided that "marriage must be solemnized by a competent officer

appointed by law" and by Article 129, "all priests, rectors, ministers, and other officers authorized by the law to keep registers of acts of civil status, are competent to solemnize marriage; but none of the officers thus authorized can be compelled to solemnize a marriage to which any impediment exists according to the doctrine and belief of his religion and the discipline of the church to which he belongs."

Other articles are as follows:

57. "Before solemnizing a marriage the officer who is to perform the ceremony must be furnished with a certificate establishing that the publication of banns required by law has been duly made; unless he has published them himself, in which case such certificate is not required."

58. "This certificate, which is signed by the person who published the banns, mentions, as do also the banns themselves, the names, surnames, occupations and domiciles of their fathers and mothers, or the name of the former husband or wife. And mention is made of this certificate in the act of marriage."

59. "The marriage ceremony may, however, be performed without this certificate (that is the certificate of publication of banns) if the parties have obtained and produce a dispensation or license from a competent authority, authorizing the omission of the publication of banns."

59A. "In so far as regards the solemnization of marriage by Protestant ministers of the gospel marriage licenses are issued by the Department of the Provincial Secretary under the hand and seal of the Lieutenant-Governor, who, for the purpose thereof, is the competent authority under the proceeding article."

63. "The marriage is to be solemnized at the place of the domicile of one or other of the parties; if solemnized elsewhere, the person officiating is obliged to verify and ascertain the identity of the parties."

Section 1297 of the Revised Statutes of Quebec enacts that "in so far as regards the solemnization of marriage by Protestant ministers, no marriage license issued in any other manner or from any other authority shall be necessary."

Section 1208 enacts that "the licenses issued under this section are furnished by such persons as the Lieutenant-Governor-in-Council names for that purpose to all persons requiring the same who shall previously have given a bond together with two sureties, being householders, and in form appended to this section."

Article 156 of the Code declares that "every marriage which has not been contracted openly, nor solemnized before a competent officer, may be contested by the parties themselves, and by all those who have an existing and actual interest, saving the right of the court to decide according to circumstances."

Article 161 of the Code provides "when the parties are in possession of the status, that is when they have lived together as man and wife publicly, and the certificate of their marriage is produced, they cannot demand the nullity of such act."

From these quotations the following conclusions may fairly be drawn: That a marriage is properly performed if solemnized publicly by a competent officer recognized by law; but no officer is compelled to solemnize a marriage if any impediment according to his religion exists; that banns may be dispensed with by license and that the license is to be issued by the civil government of Quebec. Nor is there any limitation that a Protestant minister can only marry non-Romanists.

It is quite true that a Roman Catholic priest may decline to marry either Roman Catholics or Protestants in his church unless the banns have been published, but there is no reason for the assumption that Roman Catholics or others may not be validly married elsewhere under a provincial license.

Any other construction of these articles would lead to the preposterous and unthinkable result that the provincial licence allowed the celebration of a ceremony resulting not in a marriage but in concubinage. Besides, the parties to a marriage are by articles 156 and 161 restricted to contesting (but always before the court) clandestine marriages, and cannot demand adjudication of nullity where they have lived publicly as man and wife.

To allow a church court to annul marriages is to allow it to repeal these enactments, one of which empowers the civil court so to do where the marriage has not been solemnized by a "competent officer," and the other which prohibits those who have openly lived together and have a certificate of marriage, from demanding its nullity, that is in any court or from any authority. In fact if the contention could be maintained that the ecclesiastical courts could before 1866 annul a marriage, then it can hardly be doubted that the civil code then adopted has radically altered the situation by substituting its distinct provisions regarding the solemnization of marriage for the pretensions set up under the treaty of cession, and thus, by their own law, those pretensions necessarily fall to the ground.

The "Ne Temere" decree has extended this assumed ecclesiastical jurisdiction to mixed marriages. This is an extension of the Roman Catholic claim to jurisdiction as evidenced by Archbishop Bruchesi's pastoral, and for the first time affects denominations other than the Church of Rome. It is also a step in advance as to Roman Catholics citizens. For example, while by the doctrine of the Church of Rome marriage is indissoluble by any civil power, the innocent person under a divorce by Parliament in Canada may marry again; but, if such a one were a Roman Catholic and wanted to marry, and could not get a Roman Catholic priest to marry him, the statute law of Canada would be of no effect unless a marriage by a Protestant minister were valid.

The real question, and it is of great interest, is not whether any church can annul a marriage, but whether a particular one can. No other church claims for its ecclesiastical courts such power. The Church of Rome has no greater power than any other denomination, and its claim must rest wholly upon the contention that at the conquest and cession the right to the free exercise of the religion of French Canada resulted in the abdication by Great Britain of the sovereignty of her courts in regard to what is the foundation of the security of the State. A proposition which is on its face a manifest impossibility, and one which is not even open to argument.

The *Hebert* case, in which the child of the marriage is deprived of its legitimate status, and the still more recent *Howden* case involving the annulment of a marriage celebrated thirty years ago calls attention to the extraordinary range of this astonishing invasion of civil rights. Worst of all is the indifference displayed to the incalculable suffering inflicted upon wives and children for the sake of temporal authority, which can only be maintained at the cost of the civil liberties of our people.

The proclamation of the "Ne Temere" decree has provoked emphatic protest in Canada as well as in other countries. It is rejected in Germany and non-existent in Austria. In Italy the new civil code, which deprives priests of the power of celebrating marriage, indicates the extent of the revolt against the ecclesiastical pretensions so far as Canada is concerned. We trust we have heard the last of any attempts at ecclesiastical interference with the marriage laws of this Dominion. They simply cannot and will not be permitted.

DISCRETION IN PENALTIES.

"My object all sublime
I shall achieve in time—
To make the Punishment fit the Crime,
The Punishment fit the Crime."
The Mikado.

This quotation from one of the most justly famous of comic operas may, at first sight, appear to be scarcely a fitting prelude to the discussion of so serious a subject as that intended—namely, the exercise by judges and magistrates of their discretion in the imposition of penalties for breaches of the law. Nevertheless this clever rhyme, composed, I believe, by one who was formerly a practising barrister, aptly expresses that which should be the principal aim and object of all makers and interpreters of the law.

Of the making of statutes and ordinances there is no apparent end; such at least is the impression conveyed by the perusal, year by year, of our statute books. Much time and labour is

expended—though perhaps not always successfully—in the attempt to define clearly the scope of these measures and leave no loophole for misinterpretation. It would appear, however, as if the kindred and no less important question as to the best method of securing their observance had never received the same close attention. That problem has been held to be mainly the concern of the judges, who are, accordingly, in most cases given a very wide discretion.

Given a statute designed to remedy an evil, there must obviously be some definite means of securing its observance. Otherwise, such statute shares the weakness of so-called international law, being devoid of a legal sanction. The methods most generally accepted are fines and imprisonment, and these modes of punishment, by their extent or duration, are intended approximately to measure the gravity of offences against the laws which they safeguard. Some statutes provide a maximum penalty, others a minimum, while in others again we find both a maximum and minimum. In spite of these limitations, the latitude allowed to the discretion of the judge or magistrate is, in most cases, very wide—too wide indeed to serve him as an accurate guide when assessing a penalty. His discretionary powers being so great, and there being no general consensus of expert opinion to help him, the judge's personal feelings and bias must inevitably determine the nature and extent of his sentences to a greater degree than is desirable. In cases where the judge has a thorough experience of the class of work with which he has to deal, coupled with a broad humanity in his general outlook, the results of this uncontrolled discretion may be excellent; but even assuming that all judges possess these characteristics, uniformity and consistency in the administration of the law will not be the necessary consequence.

"Quot homines, tot sententiæ" is an obvious platitude, and it is equally obvious that the opinions of learned judges vary in no small degree as to the best methods of dealing with certain crimes and criminals.

If this be the case where legal luminaries of the first magni-

tude are concerned, is it not even more likely to be true of colonial judges, who are called upon to fill important positions—sometimes with comparatively little previous training—and, in still greater degree, of the average justice of the peace, who has not (or at any rate need not have had) any such training at all.

It is with the discretion vested in these two classes that the writer proposes to deal, such personal experience as he can claim having been acquired as a judge in one of our colonies, and as a justice of the peace in Ireland. His object, in so doing is to emphasize the importance of a right exercise of judicial discretion, and to suggest a method of checking its abuse.

To attempt, within the limits of this article, to deal exhaustively with a subject involving such intricate psychology as the punishment of crime would be absurd. It will be sufficient to point out some of the difficulties which beset the path of a conscientious, but inexperienced magistrate, and shew how they might be mitigated, if not entirely removed.

The thought must constantly occur to a judge when determining the penalty for an offence—be it a felony or merely some trifling misdemeanour—that a certain specific sum of money, capable of being measured to within a few pence, or a certain term of imprisonment, capable of no less accurate definition, would, if he could but gauge it, exactly meet the requirements of the case before him. To exceed or fall short of this measure must involve an act of injustice, either to the individual whom he condemns, or to the community at large—perhaps even to both.

It will no doubt be contended that, from a practical point of view, such exactitude is impossible—that individual cases require individual treatment, and so forth. This may readily be admitted, and the writer does not propose that the discretion of those holding judicial authority, however humble, should be limited by hard and fast rules incapable of relaxation. In the inferior courts, however, some form of restraint might with advantage be imposed upon the arbitrary exercise of judicial or magisterial discretion, without endangering its principle, or in

any way impairing the efficiency of such tribunals. We would suggest as a remedy the adoption of standard penalties for each of the offences usually dealt with at Petty or Quarter Sessions, Police Courts, and other courts of similar jurisdiction. Such standard penalties would serve as guides to the Bench in deciding Crown cases, and should, in normal circumstances, form the basis of their judgments. In proportion as the circumstances varied from the normal and tended either to aggravate or partially to excuse the offence, so would the punishment inflicted be greater or less than the theoretical standard.

The objection may be raised that no crime is normal, and therefore that no standard penalty, implying a general average of guilt, is possible. This is doubtless true so far as the graver crimes, such as manslaughter, burglary, arson, and many others, are concerned; but the writer maintains that this argument does not apply to such minor offences as form the routine work of Petty Sessions or Police Courts. We hope, in due course, to be able to convince our readers of the real need for greater uniformity in the practice of courts of a similar jurisdiction. It ought not to be possible that an offender brought before one court should receive a trifling penalty, whereas, his conviction for the same offence, by another court of co-ordinate authority, would result in comparatively severe punishment. Inconsistencies of this kind should be impossible, but they are, nevertheless, of everyday occurrence. The impression produced upon the minds of those who study the Police Reports must be one of uncertainty. Yet, surely, certainty is an essential attribute of true justice.

The gaol-bird, when convicted, still stands a "sporting chance" of a light sentence; and, as a race, we are supposed to be lovers of sport of all kinds. It is more than questionable, however, whether these "sporting chances" are conducive to the moral improvement of such persons. Under present conditions it is not uncommon to hear it asserted that one magistrate is unduly severe in his attitude to certain offences, while another is charged with excessive leniency. In order absolutely to pre-

clude the possibility of such statements, it would be necessary to abolish the judicial discretion vested in magistrates, and thereby turn them into so many automatons—an object by no means to be desired. On the other hand, the steady and restraining influence of a well-defined and consistent practice with regard to punishment could, surely, be productive only of good.

Many of our readers are, no doubt, familiar with the so-called "legal pillory" in that interesting and entertaining journal, *Truth*. To those possessed of even an elementary legal training, the bald statement of the offence, coupled with the penalty inflicted, without any of the aggravating or alleviating circumstances, which may have been obvious enough to those who were present at the trial, must tend to destroy the value of such records as proofs of magisterial incompetence, or at least render them unconvincing. At the same time there are, now and then, instances of judicial vagaries which appear to justify even this method of criticism. It would be idle to assert that the general public is entirely satisfied with the manner in which the law is administered in some of the inferior courts. But what can be of greater importance than that there should be, so far as is humanly possible, entire public satisfaction in this matter!

The old idea of vengeance as the primary, if not the only, object of punishment is fast becoming obsolete. We desire, for the most part, not to kill but to cure—to prove to one who steals that honesty really is the best policy—to another who has committed an assault that to keep the King's peace pays better than to break it. In order to effect this, all suspicion either of vindictiveness or partiality should not only be absent in fact, but should as far as possible be proved to be absent by the nature of the sentence. A judge should not only act justly, and without personal bias of any kind, but he should convey the impression that he is so doing to the accused and to all those who are present in court. Otherwise, half the moral effect of his judgment is lost. How can he best convey such impression? The answer is by consistency—not only with his own previous

decisions, but also with those given by other judges in similar circumstances.

At this stage the writer may be permitted to cite briefly his own experiences when called upon to act as Chief Justice in one of our small colonies. As a new-comer he was naturally desirous of following, so far as possible, the lines laid down by his predecessors in the same office. He soon discovered, however, that there was an almost complete absence of uniformity or consistency in their decisions. Each successive holder of the office had apparently been a law unto himself, and unto himself alone.

In cases where one occupant of the Bench had been in the habit of inflicting a fine equivalent to ten shillings or thereabouts, another had imposed one of five shillings or even less, while a third had given a term of imprisonment without the option of a fine. Yet all these sentences, be it observed, had been imposed in respect of first offences of a similar character.

Generally speaking, more especially as regards trivial breaches of the local ordinances, it appeared to the writer that the penalties imposed erred on the side of undue severity; but occasionally, as if by way of contrast, some of the more serious offences, such as perjury, met with what could only be considered as utterly inadequate retribution. There was in fact an apparent absence of balance and proportion, which rendered the discovery of an underlying principle (if any such principle existed) well nigh impossible. A new judge thus found himself faced with the task of attempting to reconcile the irreconcilable, or else of striking out an independent line, and thereby adding another discrepancy to the existing catalogue.

It is a commendable practice for those who are engaged in the administration of justice among native races, to attempt to estimate its effect upon them by viewing each decision from their standpoint. In the instances I have mentioned one could scarcely expect the moral results of the punishments inflicted to be either very salutary or very lasting, since the native would see in them only the personal equation of the judge, and dumbly submit to decrees as uncertain as those of Fate herself.

What then is the moral result of casual or ill-considered punishment? Far from effecting any improvement in the character of the victim, it can only succeed in ultimately inspiring him with a certain recklessness. He must come to regard his punishment almost as a matter of luck. If his sentence is light he is in luck's way—if severe, then his luck is "out." In either case there must appear to him but a casual connection between the degree of his offence and the extent of the penalty.

The habitual offender (criminal is too strong a term) is, in his way, something of a fatalist, and fatalism of this kind is not likely to produce good and law-abiding citizens. So long as the present unsystematic exercise of judicial discretion continues, we cannot be surprised if the wrong-doer is more often hardened than reformed.

Sentimental kindness in the administration of justice is apt to be misconstrued as a sign of weakness, and thus the best intentions in the world, when coupled with inexperience, are often foredoomed to failure. Some guiding principle is needed, and a definite policy with regard to punishment will surely best meet that need.

A consistent and graduated scale of penalties would bring home to the law-breaker, by the most cogent evidence possible, the view taken of his offence—not by individual judges only, but by society as a whole—as well as the corresponding severity with which its repetition would be visited.

An attempt will presently be made to point out how this graduated scale of penalties might be brought into general use, without interfering with a reasonable exercise of judicial discretion. For the moment, however, the writer will return to his personal experiences, in order to illustrate this theory.

As a justice of the peace for the county in Ireland in which he resides, he is in the habit of attending Petty Sessions at three villages, all of them within a radius of about five miles from his home. Although there are no local conditions at any of these three places to explain the difference, the practice of the courts at each of them, in the treatment of certain minor

offences, varies to an appreciable extent. It is not suggested that these differences of treatment involve glaring or obvious injustice. It is indeed only fair to say that, considered individually, justice is, on the whole, administered with reason and impartiality; but, when considered in relation to one another, the practice of these courts is inconsistent, and therefore, to that extent, contrary to a true ideal of equity.

It is clearly inequitable, for example, that a person convicted at A of some trivial breach of the law (it matters not what) should be fined sixpence, if at B one shilling, and if at C eighteenpence. His offence against the community is the same, whether he commits it within the radius of A district, or at B, which is less than ten miles distant from A, while there is nothing to warrant greater severity at C than at A. Nor is there any intention on the part of the magistrates to exercise greater severity at one place than at another. The lack of uniformity is simply due to the absence of a common point of view or guiding principle.

Again, at one of these courts, a person, if convicted, is fined an extra sixpence if he has not appeared to answer the summons, although attendance at court may perhaps involve the loss of half a day's work. At another court his non-appearance involves no extra penalty. The latter course is perhaps the more reasonable, but the adoption by all the courts of the former would be preferable to the existing incongruity.

Some of our readers may think that the sums of money involved in the instances quoted are so small as hardly to deserve serious consideration; but apart from the question of principle, it is clear that in a locality where a labourer's daily wage is only eighteenpence, a difference even of sixpence more or less is no trifle.

As further proof of the need for some alteration in our judicial methods—so far at least as the magisterial bench is concerned—we may cite the not uncommon practice of "splitting the difference," where magistrates cannot otherwise agree as to the length of a sentence of imprisonment, or the amount

of a fine. It would be difficult to support this mode of arriving at a decision on any logical grounds—and yet under present conditions there may be no alternative. The excuse for such haphazard proceedings would disappear if there were some recognized standard upon which to fall back when opinions as to the weight or nature of a sentence were divergent.

Let us now turn to the consideration of a remedy for the inconsistencies which have been pointed out—inconsistencies which are probably no greater in the instances above quoted than in courts of similar jurisdiction throughout the British Empire. Briefly, this remedy lies in the appointment of a commission composed of persons possessed of the highest legal authority, whether as judges or jurists, for the purpose of assessing the average penalty for each legal offence, upon a first, second, or further conviction. These scales of punishment, strictly, of course, within the limits of the particular statute dealt with, would merely represent the normal penalties which it would be reasonable to inflict in cases presenting no unusual features. The recommendations of such a commission would have moral weight only, and would imply no form of compulsion whatever upon the judges and magistrates for whose benefit they were designed.

It will doubtless be objected that recommendations of this nature, without the aegis of sovereign power and authority, would be flouted, and promptly rejected—that magistrates like to go their own way, and would resent an implied interference with their discretionary powers. The writer, on the contrary, believes that every judge and magistrate who honestly desires to do his duty—and surely this must mean the great majority—would welcome any advice which would enable him to do so in a more efficient manner.

The recommendations of the Commission would, of necessity, be based upon general principles only, and might require substantial modifications according to the locality in which they were adopted. A penalty which would be reasonable and proper in the west end of London might well be excessive and unreason-

able in the west of Ireland, and entirely unsuitable to the social conditions of a negro population in West Africa. To meet such local requirements, sub-committees might be formed in each country and colony—possibly in each county, province, or other administrative area—which, while adopting the fundamental principles laid down by the Commission, would vary or modify the normal penalties to suit local conditions. By this method, while the same theory and standard of justice would obtain currency throughout the empire, any tendency to an uncompromising rigidity of detail would be avoided, whilst a greater measure of coherence and consistency would be secured. By no means the least benefit to be derived from a systematic treatment of legal penalties on the lines described, would be the gradual but sure development in the public mind of a sense of proportion with regard to the relative gravity of various offences. This sentiment would, in course of time, render impossible the glaring discrepancies in the administration of justice, which we have at present good reason to deplore.

Want of space forbids any attempt at more than an outline of this scheme for the solution of a most difficult problem. Its elaboration would involve a survey of the whole field of criminal law. One or two points, however, occur to the writer as having a special importance, if success is to be assured.

In the first place, it is clear that the amount of a fine should, ceteris pribus, be in proportion to the social, or rather financial, position of the wrong-doer. Strict accuracy would, of course, in many cases be out of the question, but nevertheless an attempt should be made to assess a money penalty in the manner described.

Again, penalties should be increased proportionally upon a second, third, or further conviction, for a similar offence. Thus, if a fine for drunkenness upon a first conviction were assessed at a sum amounting to half a day's wages, such fine might be doubled upon a repetition of the same offence within twelve months of the previous conviction, and re-doubled for a third conviction within the same period.

It would also be desirable to prescribe the point at which repeated convictions for such minor offences as are usually punished by fines should carry instead a term of imprisonment, the extent of which should also be the subject of definition. This point might be fixed at a period when the person convicted could no longer be regarded as a casual, but rather as an habitual, offender.

There are doubtless certain disadvantages in a system which would permit of a more or less accurate forecast of the penalty for any given offence. The assurance of a comparatively light punishment for certain misdemeanours might perhaps prove a temptation to commit them. On the other hand, the progressive severity with which their repetition would be visited, should serve as a more effectual deterrent than the existing uncertainty, and more than counteract the effects of the original leniency.

It cannot be too strongly insisted upon, that the standard penalty for any given offence should be regarded as an average penalty only. The judge or magistrate should feel himself entirely at liberty to vary it, should the circumstances, in his opinion, justify him in so doing. Probably, in many cases, the actual penalties inflicted would either exceed or fall short of the standard, although it is unlikely that they would do so to any great extent, if the work of the Commission had been carried out in an efficient manner. Whether the variations on either side of the line were great or small, the net result would be an average, and this would come to mean, as time went on, an ever-increasing degree of uniformity and consistency in the administration of the law.

Whenever the special circumstances of a case appeared to the judge or magistrates sufficiently important to justify a wide variation, or even an entire departure from the standard penalty, a note to that effect, inserted in the records of the court, would serve as a useful guide to the Bench in the event of a subsequent conviction.

Few schemes for the solution of any problem are perfect in their inception. None, it may safely be said, present greater

difficulties than those which attempt any reform of long-established usage or custom. The writer of these tentative suggestions claims no immunity from criticism on their behalf. He will be content if he succeeds in drawing attention to a subject which, although of the highest public interest, appears to have been hitherto unaccountably neglected. Some of the more obvious criticisms he has endeavoured to forestall and answer. Many others will doubtless occur to the minds of those who may read this article.

Granted that there are many reasonable objections to the scheme—at any rate in the form proposed—it has, at least, the merit of providing a specific remedy for a real and acknowledged evil.

Human justice is and, by its very nature, always must be, imperfect; but this fact should not deter us from striving after perfection. Amongst the highest attributes of an ideal justice may be placed those of perfect equality and consistency. Uniformity of practice in our courts is an essential factor in the attainment of these attributes. Until this is secured, that often-quoted phrase, "the lawless science of our laws," will bear a wider interpretation than the poet probably intended.—*Law Quarterly Review.*

PRESENT AND PROPOSED AERIAL LEGISLATION.

The regulation of aviation affords a particularly fertile field for the exercise of the wonderful powers of that type of statesman who unfortunately finds his way into nearly every legislature, and feels that he is specially commissioned to act as a universal regulator, and, having fairly exhausted the field afforded by things upon the earth, from the height of sky scrapers to the length of a hat pin, will be doubtless pleased with the prospect of a new world to conquer, and will turn with avidity to the heavens above.

An excellent illustration of this kind of regulation is a bill which was introduced into the legislature of a middle western

state last winter, which proposed to prohibit ascensions to a greater height than 1,000 feet, and provided for a bond of $10,000 guaranteeing obedience to the law, with a prison sentence of five years as a penalty for its violation. Just what the idea was that inspired this proposal is difficult to determine. Whether the legislator sought to protect the aviator on the theory that he wouldy be more thoroughly dead after falling 5,000 feet than after a little drop of 1,000 feet, or whether his concern was for that part of the public which occupies the lower floors of apartment or office buildings, whose danger would doubtless be increased in proportion to the altitude from which a disabled engine might fall with ever-increasing power of smashing through the protecting upper floors, will doubtless remain a profound mystery. If provisions of this kind should be taken seriously enough to insure their passage, interesting questions might arise as to how they would be enforced. To equip every constable with delicate scientific instruments for determining altitude would doubtless be expensive, and would presume too much as to the mechanical and scientific ability of those worthy and useful public servants, while to require every aviator to carry a sealed barograph, and submit to periodical inspection for the purpose of determining if he had violated the law, might be open to the objection that it would compel him to furnish incriminating evidence against himself, to say nothing of the difficulty of determining the situs of the crime. However, this difficulty would not be likely to arise, for, even if such a bill were passed, it would doubtless go the way of all such legislation, and never be heard of again.

But while there will probably appear a considerable amount of useless, if not foolish, legislation, the rapid advance made in aviation, and the increasing number of those engaged in operating ships of the air have engaged the serious attention of legislators and statesmen. Last year there was held at Paris an international conference on aerial rights, at which the principal European powers were represented. An elaborate code for the regulation of aerial navigation was adopted, and embraced such

questions as the nationality of airships, customs, regulations, jurisdiction of offences, flight over military and naval establishments and operations in time of peace, and the carrying of photographic and wireless telegraphic apparatus. While perhaps such elaborate regulations are necessary for the conditions in Europe, where there are numerous independent nations covering relatively small territory with their enormous military equipment and mutual jealousies, they hardly seem necessary in this country, and at any rate are largely matters for international agreement.

Legislation upon the subject of aerial navigation, whether already in effect or merely proposed or likely to be adopted in the future, naturally falls under three general heads, according to the object to be obtained: First, protection of the public; second, protection of the lives and property of individuals; third, protection of aviators. These will be treated in the order named.

1. Protection of the public. The first step for the protection of the public in general would seem to be the adoption of laws requiring the registration and means of identifying aerial machines in order to make effective any other regulative laws which might be passed concerning them. The Connecticut statute for which is claimed the distinction of being the first passed in this country upon the subject of aviation provides for the registration of all airships, for which a fee of $5 is charged, and requires that each ship shall bear markers with the registration number 3 feet high. Closely associated with provisions for the registration and identification of aerial machines are provisions for the examination and licensing of aviators. The Connecticut statute requires aviators to be at least twenty-one years of age and to pass an examination and take out a license, for which a fee of $2 is charged. These provisions seem to be reasonable and necessary, and similar ones might well be adopted by other states as a beginning for aerial regulation. Considerable discussion has arisen as to what qualification should be required to entitle an aviator to a license. Some proposed statutes provide for the issuing of licenses to those who hold a license from a

recognized aeronautical society, but these have been criticized because such societies, it is charged, are frequently engaged principally in the exploitation of their members, and it is feared their decisions might not be a good criterion for determining who are competent to handle aerial machines from the standpoint of the safety of the public. Whether or not this criticism is justified, it would seem that it would be better to require air pilots to qualify under public authority, to avoid insufficient tests or favoritism, and to insure uniformity of requirement. The test proposed by the draft convention include a continuous flight of at least 3 miles, and height test at a minimum of 150 feet, and tests for alighting without mishap within 150 feet of a given point. Whatever regulations are adopted in this country, an effort should be made to make the laws of the various states as uniform as possible, and provision should be made for mutual regulation of licenses issued by the various states.

2. Rules for the protection of persons and property of individuals. The discussion of this phase of the problem of aerial navigation is confined principally to regulation of the flights, as to place, the principal restrictions proposed being the prohibition of flights over centers of dense population and large aggregations of people, and over places where large quantities of explosives or highly inflammable materials are manufactured or stored. It seems to the writer that provisions of this kind are somewhat premature. If the aeroplane never gets beyond the circus stage where it is at present, the numbers in use will doubtless remain so small that danger to the public from flights over those places will be negligible. On the other hand, if they are developed from the standpoint of stability and safety for those operating or taking passage upon them, so that they become a mode of travel for a considerable number of people, the danger to the public and property upon the ground from flights overhead will be correspondingly decreased, while restrictions of the kind mentioned might seriously impede the development and impair the usefulness of aerocraft by preventing access to large centers of population. If the number of machines be-

comes so large, and their use such that they are a real danger to the inhabitants of our cities, it will then be time to prohibit their use over such places, and to make provision for aerial stations outside the center of population, but within easy access thereto by other means of transportation.

Another question to be determined by legislation is the degree of liability to be imposed upon the owners and users of aeroplanes when damage is inflicted upon persons or property. The Connecticut statute provides that "every aeronaut shall be responsible for all damages suffered in this state by any person or persons from injuries caused by any voyage in an airship directed by such aeronaut; and if he be the agent or employer of another, in making such voyage, his principal or employer shall be likewise responsible for the same."

There doubtless will be some dispute as to the meaning of this provision when cases arise under it, but on its face it seems to eliminate the questions of negligence and contributory negligence, and to impose absolute liability for damages inflicted by an airship. If it does not have this effect, it is mere surplusage, and leaves the liability in such cases to be determined on common-law principles. But whether or not the effect of this statute is to make the owners and operators of airships absolutely liable for all damages inflicted by them, it would seem that the enactment of provisions having this effect would be wise as well as opportune at the present time. The reason for imposing a high degree of care on any class of persons is the dangerous nature of the operations engaged in and the inability of those affected to effectually protect themselves against injury. The operation of airships is unquestionably dangerous to those beneath them, and they are peculiarly helpless to protect themselves from the danger which would menace them when in the privacy of their own premises as well as when in public places. It seems justifiable to say that, in the present imperfect stage of development of the aeroplane, those over whom one is operated are in greater danger than are passengers by railway or steamboat, and that, therefore absolute liability is not too severe a rule to be imposed for their protec-

tion. Then, too, such a provision would doubtless act as a more effective protection of the public against reckless and negligent aviators, and against the operation of airships over places where the danger of injury to persons and property was great, than would a large mass of complicated and cumbersome as well as probably unenforceable regulative and restrictive measures.

In addition to the liability for actual damages, it has been suggested that a fixed, reasonable amount be allowed to the owner of property upon which an involuntary landing is made without any actual damage. Whether such a provision will become desirable at any time is questionable; for the present it might well be omitted.

3, Protection of aviators. One class of proposals for laws designed particularly for the protection of those using airships, includes rules of the road, distances to be maintained in passing, signals, etc. Such matters must necessarily be worked out by the airmen themselves from experience, and may safely and more properly be left for aeronautical societies to formulate.

Other proposals seek to limit the speed and the maximum and minimum height of flight. Of these the only one which seems practical or at all desirable is the regulation of a minimum height for flight over buildings or people, and it is doubtful if even this is necessary or feasible in view of the difficulty of enforcement and the fact that the aviator himself has more at stake than any other person in maintaining a safe altitude.

It has also been proposed to prohibit racing and exhibition meets. While most of the fatalities so far in aviation have occurred at these exhibitions, no reason is apparent why they should be placed under the ban any more than the equally fatal automobile or motorcycle races. The exhibition and racing meets afford opportunities for the public to become familiar with the sight and movement of aeroplanes, and furnishes a means of financial return for those who, in the air or workshop, are seeking to develop this new means of transportation, and to whose efforts will be due the determination of the possibilities of this new invention as a servant of mankind.

It has been proposed for the protection of aviators that the upper stories of high buildings be illuminated at night, and that the owners of overhead wires be required to indicate their positions by lights at night and flags by day. Such legislation, if it ever should be advisable, would be premature at this time. Practically no flights are made by night at present, and if they become common in the future, aviators may be relied on to protect themselves from such dangers, and it is at least questionable if they would not be safer relying on themselves for protection than they would be if they were led to rely on the enforcement of such a law, which would be only partial and intermittent at best.

One proposal which is closely associated with the provisions for registration of machines, but which is primarily for the protection of the aviator, though it is also important for the protection of others, is the inspection of machines before their registration and use is permiited. One of the causes of the numerous fatalities in aviation is the weak construction of machines, and this danger is increasing with the large numbers of inexperienced amateurs who are constructing their own machines. The danger to those using such machines and to others is great enough to justify a provision for the rigid inspection by experts of all aircraft before they are registered and their use permitted.

By way of conclusion and summary, it seems to the writer that there is more danger of too much legislation upon the subject of aviation, than there is that we will not have enough; that the dangers to the public and individuals are as yet largely imaginary, and may never become real, and that in general it will be best to await the development of aerial navigation and apply legislative remedies only as needed. For the present, in this country at least, sufficient restrictions may be embodied in statutes providing for the inspection, registration, and identification of machines; for the examination and licensing of aviators; and for the absolute liability of owners and operators of aerial craft for all injury to the person and property of those over whom they fly.—*Case and Comment.*

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

TRUSTEE—INVESTMENT—INSUFFICIENT SECURITY — MORTGAGE—TRADE BUILDINGS—ADVANCE OF MORE THAN ONE HALF VALUE —VALUATION—BREACH OF TRUST—TRUSTEE ACT, 1893 (56-57 VICT. c. 53) ss. 8, 9—JUDICIAL TRUSTEES ACT, 1896 (59-60 VICT. c. 35), s. 3—(1 GEO. V. c. 26, ss. 30, 36, ONT.).

Palmer v. *Emerson* (1911) 1 Ch. 758. This was an action against trustees for an alleged breach of trust in having invested the trust fund on an insufficient security and without procuring an independent valuation of the property. The security in question consisted in part of premises in which for forty years, the business of a butcher had been successfully carried on. At the time of the loan, a bank had in 1899 advanced £6,000 by way of overdraft to the mortgagor on the security of a deposit of the title deeds, and it was arranged that the bank should accept £3,500 from the trustees, who were to be first mortgagees therefor, and the bank was to take a second mortgage for the balance of its debt. The property had been valued in 1896 by a competent valuator at £6,550, of which the butcher business premises represented £3,800. Subsequent to the loan the butcher business was discontinued, and the value depreciated so as to be an insufficient security. On the evidence, Eve J. found that at the time of the loan the value of the property was £5,500, and he came to the conclusion that there is no rule which prevents trustees from lending more than one half, where part of the security consists of premises used for trade purposes; and that having regard to the advances made by the bank, and their willingness to take a second mortgage, the trustees had not acted unreasonably, and that though the loan was somewhat in excess of the amount which ought properly to have been lent, it was nevertheless a case in which he ought to exercise the discretion given him by statute to relieve the trustees from personal liability.

CANADIAN PACIFIC RAILWAY—CONSTRUCTION CONTRACT OF C.P.R. CL. 16—(44 VICT. c. 1 (D.))—EXEMPTION OF LANDS FROM TAXATION UNTIL SOLD OR OCCUPIED.

The King v. *Canadian Pacific Railway* (1911) A.C. 328. By the construction contract under which the Canadian Pacific Railway was built, ratified by 44 Vict. c. 1 (D.), it is provided by

clause 16 that the lands of the company are to be exempt from taxation until they are sold or occupied for twenty years after the grant thereof from the Crown. Certain lands of the company in Alberta had been contracted to be sold and part of the purchase money paid, but the contracts were subsequently annulled for default of the purchaser. The Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson, Shaw, Mersey, and Robson), affirming the Supreme Court of Alberta, held that this was not a sale within the meaning of the Act, so as to render the lands liable to taxation. Another contention on the part of the Province of Alberta was that the twenty years' exemption commenced from the time when the survey of the lands was approved by the Surveyor-General and the lands were thus identified as part of the land subsidy of the company notwithstanding that the patent therefor did not actually issue until nine years afterwards, but their Lordships also agreed with the provincial court, that the twenty years ran from the date of the patent.

PATENT FOR INVENTION—SALE OF PATENTED ARTICLE TO JOBBERS AND DEALERS—CONDITIONS IMPOSED ON DEALERS—INFRINGEMENT OF PATENT—INJUNCTION—(R.S.C. c. 69, s. 21)—COSTS.

National Phonograph Co. v. *Menck* (1911) A.C. 336. This was an appeal from the High Court of Australia. The action was brought by a patentee to restrain an infringement of his patent of invention in the following circumstances. The invention was an improvement in phonographs and sound records. The plaintiffs in course of their business sold the patented articles to jobbers who in turn sold them to dealers, the dealers' contracts, however, were made with the plaintiff. The main object of these contracts was to prevent cutting of prices and the introduction of rival goods by way of exchange. The defendant held various dealers' contracts and was entered on the plaintiff's list, and under these contracts he was liable to be withdrawn from the list on violating any of the conditions of sale which might from time to time be imposed; and if so withdrawn he undertook "not to handle, sell or deal in or use either directly or indirectly" the patented articles unless authorized in writing to do so by the plaintiffs. The defendant's name was withdrawn from the list, but he still continued to sell the patented articles. The plaintiffs claimed an injunction to restrain him

from so doing. The Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson, Shaw, Mersey, and Robson) agreed with the Australian court that no breach of contract had been established against the defendant. But on the important question whether a patentee can effectually impose conditions on which his patented article may be sold by others, their Lordships differed from the Australian court, and while conceding that special conditions of sale cannot be attached to a patented article so as to bind third parties into whose hands it may come without notice; they nevertheless concluded that such conditions may be made so as to bind all those who have actual notice of them. And applying that principle to the case in hand, their Lordships found that the defendant had actual notice of the restrictive conditions imposed by the plaintiffs, and therefore the plaintiffs were entitled to an injunction to restrain him from selling the patented articles contrary to those conditions. It appears that special leave to appeal was granted, and their Lordships, though to some extent allowing the appeal, nevertheless refused to reverse the award of costs to the defendant in the court below, and moreover ordered the appellants to pay the defendants' costs of the appeal as between solicitor and client.

SWARM OF LOCUSTS—DRIVING DESTRUCTIVE INSECTS FROM PREMISES—DAMAGE TO ADJOINING OWNERS.

Greyvensteyn v. *Hattingh* (1911) A.C. 355 was an action for damages founded on the fact that the defendants had driven a swarm of locusts from their land, with the result that the locusts had settled in the plaintiff's land and destroyed his crops. The Judicial Committee of the Privy Council (Lords Macnaghten and Robson, and Sir A. Wilson) agreed with the Supreme Court of the Cape of Good Hope, that the defendants had a right to drive the insects from their property, and that their settling on and injuring the plaintiff's crops gave him no cause of action against the defendants, there being on their part, no intention of injuring the plaintiff.

RAILWAY—NEGLIGENCE—DAMAGE CAUSED BY COLLISION—PLAINTIFF A TRESPASSER—NO BREACH OF DUTY TO DEFENDANT.

Grand Trunk Ry. v. *Barnett* (1911) A.C. 361. This was an appeal from the Court of Appeal for Ontario. The action was brought to recover damages against the Grand Trunk Railway for injury to the plaintiff caused by a collision owing to the

alleged negligence of the defendants' servants. It appeared that the plaintiff was a trespasser on a train of the Pere Marquette Railway, and while on the platform of a car in that train it backed into a car of the Grand Trunk Railway Co. which had been left without light on a siding foul of the main line on which the Pere Marquette train was backing. The accident occurred on the defendants' premises. The Judicial Committee of the Privy Council (Lords Macnaghten and Robson, and Sir A. Wilson) disagreed with the majority of the court below and held that the plaintiff was a trespasser not only on the Pere Marquette train, but also on the defendants' premises and that no breach by the defendants of any duty to him was shewn and therefore they were not liable as claimed.

NOTE.—On p. 460, ante, second line, for "appropriate" read "approbate."

Correspondence

PROFESSIONAL ETHICS.

Editor, CANADA LAW JOURNAL:

DEAR SIR,—I would like to elicit the views of your Journal, or of some of its able contributors, upon a matter of professional ethics. Suppose a person consults a solicitor in respect of an alleged wrong, and the solicitor writes to the person complained of asking redress, and obtains an offer of compensation, which is communicated to the client, but, being deemed by him insufficient, is refused, although its acceptance is advised by the solicitor.

The complainant then consults another solicitor, who writes to the alleged wrong-doer asking a settlement, threatening action, and, failing settlement, asking the name of his solicitor authorized to accept service of process on his behalf. The first mentioned solicitor writes in reply that he is authorized to accept such service. The question is, can a solicitor, having been consulted by and having advised and acted for one party as mentioned, afterwards properly accept a retainer from and act for the other party? In other words, to put it generally, is there any circumstance or combination of circumstances, that can justify a lawyer, who has acted for a client in a litigation or threatened litigation, in subsequently acting for the other side?

Yours truly,

A. B.

[Conduct, such as is spoken of in the above letter is most reprehensible. The solicitor first consulted had no business whatever to act for the other party. Speaking generally, there are no circumstances or combination of circumstances that could justify a lawyer who has acted for one client in litigation or threatened litigation in subsequently acting for the other side. If such conduct were brought to the attention of the Law Society a solicitor acting in the manner complained of would doubtless be properly disciplined.—ED. C.L.J.]

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ex. C.] [May 8.

THE KING *v.* JONES.

Expropriation of land—Compensation—Transcontinental railway commission—Jurisdiction—Railway Act—Exchequer Court Act., sec. 2 (*d*)—3 *Edw. VII. c.* 71.

The Transcontinental Railway Act, 3 Edw. VII. c. 71 does not expressly empower the commissioners to deal with compensation for land taken for the railway, and sec. 15 giving them "the rights, powers, remedies and immunities conferred upon a company under the Railway Act" does not confer such power.

The Transcontinental Railway is a public work within the meaning of s. 2, sub-s. (*d*) of the Exchequer Court Act and proceedings respecting compensation for land taken for the railway may be taken by or against the Crown in the Exchequer Court.

Judgment of the Exchequer Court (13 Ex. C.R. 171) reversed and appeal allowed without costs.

E. L. Newcombe, K.C., for appellant.

Ont.] SMITH *v.* GOWGANDA MINES. [June 1.

Joint stock company—Allotment of shares—Surrender by Allotee—Unpaid calls—Transfer—Waiver.

S. subscribed for shares in a mining company, was notified of allotment of the same and paid the amount due on a first call as agreed. Later he notified the company that he withdrew his subscription, and, refusing to pay further calls, was sued therefor. It turned out that when S. subscribed for the stock all the shares had been allotted by the company and that given to him had been obtained by surrender from one of the original allotees.

Held, 1. Under the Ontario Companies Act when stock has been allotted by a company the only case in which the directors can regain control of it is that of forfeiture for non-payment of calls. As in this case there was no forfeiture, the company

did not legally own the stock allotted to S. and could not compel him to pay for it.

2. The provision in said Act that stock on which calls are unpaid cannot be transferred is imperative and cannot be waived by the company.

Appeal allowed with costs.

Hellmuth, K.C., and *Gallagher*, for appellant. *Smythe*, K.C., for respondents.

N.B.] CROCKETT *v.* TOWN OF CAMPBELLTOWN. [June 1.

Municipal corporation—Water service—Statutory authority—Construction of Statute—Water for domestic, fire and other purposes—Motive power—Discretion of council.

The charter of a town (50 Vict. c. 58, s. 6 (N.B.)) provides that "the town council of the town of Campbellton are hereby authorised and empowered to provide for the said town a good and sufficient supply of water for domestic, fire and other purposes."

Quaere, per DAVIES J., and ANGLIN, J.:—Could the town be compelled to furnish water power for a motor in an industrial establishment?

Held, per IDINGTON, J., FITZPATRICK, C.J., and DUFF, J., contra that the charter does not empower it to do so.

The town council by by-law, fixed the rates to be paid for water including "printing presses one service, 1¼ pipe or less, per year $30." C., proprietor of a newspaper and printing establishment, connected his premises with the water mains by a two-inch pipe and received water for a year for his motor paying said rate therefor. He then continued the use of the water for some months when the council passed a resolution that newspaper proprietors should be notified that the supply would be cut off at a certain date, which was done. C. brought an action for damages to his business.

Held, per IDINGTON, J.:—The council had no authority to make the contract with C.; there was no authority in the absence of a special contract with the town, to place a two-inch service pipe for receipt of water, and if the municipality had power to enter into this agreement it was under no duty to exercise it.

Per FITZPATRICK, C.J., and DAVIES, DUFF and ANGLIN, JJ.:—If any contract existed it was one under which C. was entitled to a supply of water for his motor so long as the town council should, in its discretion, deem it advisable to continue it.

Per DAVIES, J., and ANGLIN, J.:—There was no evidence to warrant the jury's finding that the council was guilty of negligence, and exercised its discretion malâ fide.

Per FITZPATRICK, C.J. and DUFF, J.:—The circumstances disclosed were such as to warrant a finding of unfair discrimination against C.

Judgment appealed against (39 N.B. Rep. 573) affirmed, and appeal dismissed with costs.

O. S. Crockett, for appellant. *Teed*, K.C., for respondent.

Province of Ontario.

COURT OF APPEAL.

Moss, C.J.O., Garrow, Maclaren, Magee, JJ.A., and Sutherland, J.] [July 13.

MANUFACTURERS' LUMBER CO. *v.* PIGEON.

Receiver—Equitable execution—Fund not presently payable—Contract.

Appeal by the plaintiffs from the order of a Divisional Court, 22 O.L.R. 378, reversing the order of MIDDLETON, J., 22 O.L.R. 36, by which a receiver was appointed, by way of equitable execution of the plaintiffs' judgment, to reach a fund in the hands of the Corporation of the City of Stratford.

MACLAREN, J.A.:—. . . The defendant had entered into a contract with the City of Stratford to pave a certain street and maintain it for 10 years. On the completion of the paving, he was to be paid 90 per cent. of the contract price, and the remaining 10 per cent. was to be retained by the corporation until the expiration of the 10 years, with the right to pay out of the same for any repairs not made by the defendant, interest being allowed him meantime on the balance in the hands of the corporation. The contract provided that at the end of the 10 years a "final certificate for the balance due (if any) shall be issued and paid to the contractor."

The whole question is, whether the said 10 per cent. is such a sum as is subject to equitable execution, and whether a receiver should be appointed. No case precisely in point was cited to us, and I have not been able to find any. It cannot be said that the authorities in cases more or less analogous are consistent

with each other or that they can all be reconciled. Upon the whole, the weight of authority appears to be decidedly in favour of the view taken by the Divisional Court, that this is not a proper case for the appointment of a receiver. The contract for the paving and maintenance is a single contract, and the money is only divided or apportioned for the purpose of payment. It is significant, also that the final certificate is not to issue until the expiration of the 10 years, and then only for the amount (if any) then found to be due. It is not at all certain that any part of the 10 per cent. retained by the corporation will ever be due or payable to the defendant, in which case the action of the Court in appointing a receiver would be wholly barren and fruitless.

Of the cases that have been referred to, I think that of *In re Johnson*, [1898] 2 I.R. 551, bears the closest analogy in its facts to the present; and in that case an Irish Divisional Court held that it was not a proper case for the application of the principle of equitable execution.

Appeal dismissed.

R. T. Harding, for plaintiffs. *R. S. Robertson*, for defendant.

Full Court.] [June 17.

WARREN, GZOWSKI & Co. v. FORST & Co.

Evidence—Telephone conversation between parties—Testimony of persons hearing words of one party—Admissibility.

Appeal by the plaintiffs from the judgment of a Divisional Court, 22 O.L.R. 441, ordering a new trial on account of the rejection by the trial Judge of certain evidence tendered by the defendants.

The parties are brokers in Toronto and the dispute is over a stock transaction. Both plaintiffs and defendants admit that there were telephone conversations between them on the 28th and 29th of June.

The defendants proposed to have their stenographer, Annie Slough, who claimed to have been in the same room as her employer during the conversation of the 28th, testify as to what he said through the telephone on that occasion. The trial Judge refused to allow her to do so, on the ground that she could not swear that it was the plaintiff Gzowski that was at the other end of the line, or that he had heard what the defendant Forst had spoken into the telephone. The Divisional Court over-

ruled the trial Judge and ordered a new trial, from which the defendants appeal.

MACLAREN, J.A.:—No English or Canadian authority was cited to us on the point. A number of American cases were referred to, the weight of authority there being in favour of the reception of such evidence. Among the cases that may be mentioned are *Miles* v. *Andrews*, 103 Ill. 262; *McCarthy* v. *Peach*, 186 Mass. 67; *Dannemiller* v. *Leonard*, 8 Ohio Circ. 735; *People* v. *McKane*, 143 N.Y. 455; *Shawyer* v. *Chamberlain*, 113 Iowa 742.

On principle I do not see how such evidence can be excluded. It is simply an application of the old recognized rules of evidence to modern methods and conditions. After a witness has sworn that he recognized by his voice the person to whom he was speaking, and who was answering him from the other end of the line, it is quite competent to produce in corroboration one who heard what he spoke into the telephone, in so far as it is relevant to the matter in question. In case of an oral contract it is not necessary that each witness should have heard the whole contract. The witness may testify as to what he heard, and it is for the Judge or the jury, as the case may be, to determine what weight is to be attached to it. If, for instance, two persons of different languages, but each understanding the language of the other, were to make a contract, each using his own language, a bystander, knowing only one of these languages, might testify as to what was said in the tongue he understood. Or a witness might testify as to what was said by one person on an occasion, although he might not be able to identify, or even see or hear the other party to the conversation provided the latter were identified *aliunde* as the other party. The fragmentary nature of the testimony, the possibility of a dishonest party talking into a telephone in the hearing of his witnesses without having any connection with the person to whom he was purporting to talk, and giving answers to questions that were never asked, are all circumstances that should be taken into account in determining what weight is to be attached to the evidence, but are not valid grounds for refusing to hear it at all. Such testimony is not in any way objectionable as being hearsay.

Appeal dismissed.

F. Arnoldi, K.C., and *D. D. Grierson*, for the plaintiffs. *A. McLean Macdonell*, K.C., for the defendants.

HIGH COURT OF JUSTICE.

Divisional Court—Chan. Div.] [June 15.

THIBODEAU *v.* CHEFF.

Negligence—Parent and child—Fire caused by act of imbecile son—Parents' liability.

Appeal by defendant from judgment of BRITTON, J., in an action for damages for injuries caused by the act of the defendant's son, who set fire to plaintiff's property. The boy was half-witted and in the habit of doing foolishly mischievious acts. The father did not see the act which caused fire nor consent to it or share any benefit therefrom, but rather shared in the loss. The rule of the common law was stated to be that a parent is not, because of his family relationship, legally responsible to answer for damages of the torts of his infant child, unless, amongst other things, he acquiesced in the act; so that in this case the question to be determined was as to the father's acquiescence.

Held, that the father's assent may be expressed or implied, and, if he carelessly and negligently countenanced his child in having used dangerous material which might be expected to do harm he was liable without direct approval of the particular act of tort; but, as in this case the father knew that the child was in the habit of doing torteous acts and was irresponsible and had access to matches and was allowed to handle and play with them, and the father failed to take steps to avert the disaster by removing the matches or by restraining the child, he was liable.

M. Wilson, K.C., for defendant. *O. L. Lewis*, K.C., for plaintiff.

Divisional Court—K.B. Div.] [July 19.

BONDY *v.* SANDWICH, WINDSOR, AND AMHERSTBURG RY. CO.

Street railway—Operation of on township highway—Township by-law forbidding running of animals at large—Animal killed by car—Negligence.

Verdict of jury of County Court of Essex for $200 damages for the killing of a horse on the highway. Appeal by the defendants. The plaintiff alleged that his horse was lawfully upon the highway and that the defendants' servants were negligent

in the operation of an electric car running on a tract on the highway. The jury found, (1), that the plaintiff's horse was wrongfully on the defendants' right of way, but (2), that the defendants could, by the exercise of reasonable care, have avoided the accident. The only negligence proved or which could be considered was that the motorman should have seen the horse sooner.

Held, 1. There is no such thing as negligence in the abstract. Negligence is simply neglect of some care which one is bound by law to exercise towards somebody.

2. That as the defendants were rightly upon the locus in quo, they did not owe any duty to the plaintiff in respect of his straying horse, which was a trespasser, except to use of proper precautions after discovering a condition of things which would be likely to cause an accident.

3. The case might be different if it had been proved that the township was in the habit of permitting a violation of their by-law, so that the horse might be expected upon the highway, or if, for any other reason, horses running at large were to be expected to be on the road and therefore on the track.

See *Barnett* v. *Grand Trunk Ry. Co.*, ante, page 385.

C. A. Moss, K.C., for defendants. *J. H. Rodd*, for plaintiff.

LAW SOCIETIES.

The Law Society of Alberta.

The eighth convention was held at Lethbridge on July 4, 5. A very satisfactory report was presented by the treasurer. The secretary reported that during seven months since the last Convocation, 35 barristers and solicitors had been enrolled, bringing the total number up to 347. The solicitor of the society reported on some matters of discipline; this report shewing that this important part of the duties of a law society had apparently been well attended to. Grants were made to branch libraries at Wetaskiwin, Red Deer, Medicine Hat, Macleod and Lethbridge. It was decided to co-operate with the Law Society of Saskatchewan in endeavouring to have the Provincial Governments of Alberta and Saskatchewan jointly re-print the complete ordinances of the North-West Territories. Speaking generally, we may gather that the business appertaining to the welfare of the legal profession in the Province of Alberta is being carefully attended to. The President is Mr. James Muir, K.C., and the secretary, Mr. Chas. F. Adams.

Canada Law Journal.

VOL. XLVII. TORONTO, SEPTEMBER. Nos. 17 & 18.

LIABILITY OF A MASTER, APART FROM CONTRACT, FOR TORTIOUS ACTS DONE BY A SERVANT WHILE IN CONTROL OF VEHICLES AND HORSES.

1. Introductory.
2. Liability predicated on the ground of the personal fault of the master.
3. Liability negatived on the ground of the servant's want of power to do the act which caused the injury.
4. Injury inflicted on a journey undertaken in the course of the servant's duties, and prosecuted without any deviation.
5. Liability as affected by the servant's deviation from a prescribed route generally.
6. Same subject. Effect of servant's deviation from a prescribed route for his own purposes.
7. Same subject. General remarks as to the conflict of doctrine.
8. Deviation as an element in cases where the servant is not required to follow a definite route.
9. Liability as to acts done by the servant after having accomplished the extraneous purpose of his deviation.
10. Injury inflicted in the course of a journey made exclusively for the servant's own purposes.
11. Injury inflicted on a journey undertaken partly on behalf of the master, and partly for the servant's own purposes.
12. Liability of a master in respect of injuries wilfully inflicted.
13. Liability considered with reference to the element of ownership.
14. Liability as affected by special statutes.

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1. Introductory.—In the present article it is proposed to review the decisions which bear upon the extent of a master's liability for injuries which persons to whom he does not owe any special duty arising out of contract sustain by reason of the tortious acts of servants employed to perform work by means of, or with reference to, vehicles or riding-horses. The liability of common carriers and other bailees will not be considered.

The cases thus chosen for discussion are particularly interesting and important, not only because they carry us back to a very early period in the history of the general principle, Respondeat superior, but also because the element of a local deviation which many of them involve has given rise to some extremely perplexing and difficult questions which have produced a notable conflict of judicial opinion.

2. Liability predicated in the ground of the personal fault of the master.—In cases where a vehicle or riding horse used by a servant for the purpose of performing his appointed work inflicts injury upon a third person, it is clear that, irrespective of whether the evidence is or is not such as to shew a right of recovery against the master under the principle, Respondeat superior, liability may be imputed to him, if it appears that he himself was guilty of a breach of duty in respect of the aggrieved party, and that his default was a proximate cause of the injury complained of. The cases which illustrate the situation are divisible into the following classes:

(1) Those in which the injury was caused by an incompetent servant, of whose incompetency the master had notice, either actual or constructive, before the injury was inflicted.[1] In

[1]In *Wanstall* v. *Pooley* (Q.B. 1841) the substance of which is stated in a note to 6 Cl. & Fin. 910, it was held that the employment of a tipsy man by the defendant's agent was an act of negligence, rendering the defendant liable for injuries caused by the man's leaving a truck on the roadway.

In *McGahie* v. *McClennen* (1903) 86 App. Div. 263, N.Y. Supp. 692, where the evidence justified the inferences that the driver of a team of horses negligently lost control of them, or that he was not competent to drive them, and that the owner was aware of that fact, a finding that the owner was negligent was held to be warrantable.

In *D. H. Ewing & Sons* v. *Callahan* (1907: Ky.) 105 S.W. 978, evidence that the servant was about 18 years of age, had been in defendant's employ but a few months, was without previous experience in street driving, and usually drove recklessly, was sufficient to warrant an instruction which predicated liability on the master's part if the servant was incompetent, and known by the master, either actually or constructively, to be so.

this connection, it should be observed that, as the principle, Respondeat superior, operates independently of the presence or absence of the element of incompetency, a plaintiff cannot recover on this footing, unless he declares specifically upon the master's negligence in employing or retaining an unfit person.[2] The burden of proving negligence in respect of the employment or retention of the servant lies on the plaintiff.[3]

(2) Where the tortious act was done either by the orders of the master, or with his sanction as implied from the fact that he was present when it was done and refrained from exercising his power of control for the purpose of preventing it.[4]

(3) Those in which the injury was caused by some defect in the vehicle or horse entrusted to the servant, and the existence of that defect evinced negligence on the master's part. In cases of this type recovery may be had without proving that the servant was guilty of misconduct in managing these instrumentalities.[5]

3. Liability negatived on the ground of the servant's want of power to do the act which caused the injury.—The injured person will be precluded from recovering damages from the master of the tortfeasor, if the evidence discloses either of two situations.

(1) One of those situations is presented where it appears that the management of the vehicle or riding-horse which

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[2]For cases in which evidence respecting the unfitness of the servant was held to have been properly excluded on the ground that it was not averred in the declaration, see *American Strawboard Co.* v. *Smith* (1901) 94 Md. 19, 50 Atl. 414; *Dinsmoor* v. *Wolber* (1899) 85 Ill. App. 152.

[3]*Warren* v. *Porter* (1906: Mich.) 108 N.W. 435, (team was frightened and ran away, owing, as was alleged, to its having been driven on the wrong side of a street car).

[4]*Chandler* v. *Broughton* (1832), 1 Cr. V.M. 29; *McLaughlin* v. *Pryor* (1842), 4 M. & G. 48; *Strohl* v. *Levan* (1861), 39 Pa. 177. The actual point determined in all these cases was that, under the given circumstances the appropriate form of action against the master was trespass. See § 12, *post*.

[5]*Johnson* v. *Stevens* (1908) 123 App. Div. 208, 108 N.Y. Supp. 407, where owing to the unsafe and suitable character of a wagon, a portion of the load fell upon the team and caused it to run away.

inflicted the injury was neither a function with which the servant was entrusted by the terms of the contract of hiring, nor a function which, either on the ground of an emergency or for some other special reason, he was impliedly authorized to assume at the time when the injury was inflicted.[1]

[1] In *Beard* v. *London Gen. Omnibus Co.* (1900) 2 Q.B. (C.A.) 530, 83 L.T.N.S. 362, an omnibus, belonging to the defendant company, was left by its regular driver in charge of the conductor at the end of one of its journeys. The conductor, for the purpose it was alleged of turning the omnibus round, in readiness to start on its return journey, drove it through an adjoining street, and in so doing negligently ran down and injured the plaintiff. The plaintiff brought an action against the proprietors of the omnibus, and at the trial gave no evidence as to the conductor's authority to drive, or as to the existence of an emergency. *Held*, by A. L. Smith and Romer, L.JJ., that the plaintiff had not discharged himself from the burden cast upon him of shewing that the injury was due to the negligence of a servant of the defendants acting within the scope of his employment, and that the defendants were entitled to judgment. *Held*, by Vaughan Williams, L.J., that in general, if, in the absence of the driver of an omnibus, an accident occurs while the conductor is driving, it would be for the proprietor to shew that the act was unauthorized, but that the facts of the particular case negatived the giving of authority, and that the defendants were entitled to retain the judgment. Smith, L.J., said: "I agree that on a plaintiff giving evidence that the driver of an omnibus of the defendants was guilty of negligence, there would be a prima facie case that the omnibus was being driven by an authorized servant of the company within the scope of his employment. But that is not this case, for it was expressly opened to the jury as a case in which the omnibus was not being driven by the driver who was employed to drive it, but by the conductor. When a case is so opened that negatives the presumption that the omnibus was being driven by the authorized agent of the company, because primâ facie it is not the duty of the conductor to drive any more than it is the duty of the driver to take fares. My brother Romer, in the course of the argument, put the illustration of an omnibus being driven by a stranger to the defendants. In such a case it would be impossible to say that the proof that the omnibus was being driven by a stranger would raise any case against the company. The plaintiff must in such a case go on to shew that the stranger was driving with the consent or approval of the company, or on such emergency that their consent must be implied. There was no evidence on either of these points as regards the conductor; and therefore Lawrence, J., came to the conclusion—and, in my opinion, rightly—that the plaintiff had not made out a primâ facie case." Romer, L.J., said: "I agree that the plaintiff's appeal fails. If one sees in the streets of London an omnibus admittedly belonging to the defendant company driven in the

(2) The other situation occurs where it is shown that the

ordinary way by a person who appears to be a driver, the presumption is that he is authorized by the company. That presumption may be removed. In this case it was rebutted by the plaintiff's evidence, for it proved that the de facto driver was not the person authorized to drive, but a person authorized and employed to act as conductor. In such a case the onus of shewing some special authority given to the conductor to do the act which he did lies upon the plaintiff. No such authority was shewn, and no case of necessity to do the acts which the conductor did was suggested, nor do the facts lead to any presumption that a case of necessity had arisen." Vaughan Williams, L.J., said: "I think this case is somewhat on the border line. I agree, that, if on the plaintiff's evidence it was clear that the conductor was doing something outside his functions, the judgment was rightly entered for the defendants; but I do not think one has any right to assume, without any evidence being given as to what are the functions of a driver and a conductor, that it is necessarily beyond the functions of a conductor, to take charge of an omnibus in the absence of the driver. It seems to me that the company send out their omnibus in charge of a driver and a conductor, and though they have different functions to perform, it is not inconsistent with that fact that it may be within the scope of the authority of one of them temporarily to perform the duties of the other in his absence. If the evidence of the plaintiff had shewn that one journey had come to an end and another commenced, and that between these points of time the conductor had turned the omnibus round, I should have thought that there was a case for the jury, and that it would be for the defendants to shew that the act was outside the scope of the authority of the conductor to take charge during the absence of the driver. I have, however, looked through the evidence, and I find that the omnibus was not merely being turned round, but was in a side street, and was coming downhill at the rate of eight miles an hour; and it does seem on the evidence as if the conductor was not merely performing some temporary duty during the absence of the driver, and that the driver may possibly have done that which he had no right to do—that is, delegate his authority to the conductor. I think very strongly that it would be unfortunate that it should go forth to the public that, whenever a conductor is found exercising some function of the driver, no case can be made against the omnibus proprietor unless the plaintiff is in a position to call evidence to account for the temporary absence of the driver. It seems to me to be a sounder view that, where a driver and a conductor are sent out in charge of an omnibus, and complaint is made of some act done by the conductor, it should be left to the jury to say whether that act so complained of was within the authority given to the conductor. It is all very well to say that one knows that the authority given to a driver is to drive, and that given to the conductor is to conduct, but it is incorrect that one is entitled to deal with the case on that hypothesis. I cannot myself say whether at

injury was sustained while the complainant was riding upon

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the end of one journey and the beginning of the next the conductor has any duty with reference to the horses, or what that duty, if any, may be. I have considered it right to express by view that, in the absence of the driver when the omnibus is out taking passengers, prima facie it is the duty of the conductor to take charge of the omnibus in the absence of the driver, and, if what he does is apparently consistent with that duty, it would be for the defendants to prove that in fact what he was doing was beyond his functions."

In *Wilson* v. *Owens* (1885) 16 L.R. Ir. 225 (decision affirmed by Court of Appeal), the defendant was the proprietor of a hotel and shop in the town of C., and kept a pony and chaise for his own personal use, They were not used for the purpose of the defendant's business. The accident in question occurred during a temporary absence of the defendant, who had left a servant, E., in charge of the shop only, with the authority to sell goods, and generally to see that things went right in his absence. The defendant gave E. no authority to drive. Another servant named M. was in charge of the yard and it was his duty to drive when the defendant required. The housekeeper had charge of the house. While the defendant was so absent, one of his relatives, Q., who admittedly had no authority to act as his agent, called at the house, and, when leaving, was by his request driven by E. in the pony chaise to the neighbouring railway station. When E. was so driving the pony and chaise the accident took place. *Held*, that there was no evidence proper to be submitted to the jury that E. was at the time of the accident acting in the course of his employment as the defendant's servant. Andrews, J., said: "In considering whether there was any evidence fit to go to the jury upon the question above referred to, the whole of the evidence affecting it must be considered. Egan's evidence, on cross-examination, that he was left in charge when the defendant was away, and that he was there in the defendant's place when he was away (which are probably the strongest statements in the entire evidence in the plaintiff's favour), cannot, as was conceded, be taken without some qualification, and must be taken in connection with his evidence that he never drove the defendant's trap; with the admitted absence of any express authority to him from the defendant to drive it; with the evidence of Thomas Quinn, that it was he who ordered out the trap, and said that Egan could drive (which order on the defendant's uncontradicted evidence, Quinn had no authority to give); with the undisputed fact that the person whose business it was to drive the pony was M'Nally, and not Egan; and with the defendant's evidence that Egan was the man he looked to to see that, when he was away, things would go on as before."

In *Martin* v. *Ward* (1887) 14 Sc. Sess. Cas. 4th Ser. 814, a salesman in a shop having borrowed a van from a friend who came with it to drive it, placed on it, with his master's knowledge and consent, certain articles which he had been directed to remove to another shop. The driver having

the vehicle or horse in pursuance of an invitation given by the

become intoxicated, the salesman took the reins himself, and by his carelessness knocked down two children who were crossing a street. *Held* (diss., Lord Craighill), that the shopkeeper was not responsible for the injury, because the salesman was acting outside his duty in undertaking to drive the van. Lord Rutherford Clark said: "If Ward, senior, had hired a van and the services of a vanman to remove bottles, and if in the course of doing so the vanman had run down a person on the street and injured him, I do not think that Ward would have been responsible. He would not have been in any way to blame for the accident. I think that was his true position. He allowed his son to take the use of the van when under the charge of the owner of the van. In other words, he allowed his son to employ Newton & Blair to remove the bottles in their van. He never understood or agreed that his son was to drive. . . . No doubt Ward, junior, came in the end to be the driver, and was the driver at the time of the accident. But the reason was that the person who ought to have been driving became drunk. In consequence Ward junior seems to have thought it best to take the reins, and perhaps he was right enough to do so. But I do not think that makes Ward senior liable for the driving of the van. The son is the father's servant, but only in the shop. He was not his father's servant when driving the van, for he had no authority from his father to drive it. He was then acting for Newton in consequence of Newton's incapacity:" Lord Craighill thought that the defendant should be held liable on the ground that he had knowledge of the employment of the van on his business, and had left to the son's discretion the arrangements as to the removal. There seems to be much plausibility in this view of the situation. It is possible that the defendant might also have been treated as liable on the ground that, under the circumstances, it was in a reasonable sense necessary that some one should take the place of the intoxicated driver, and that his son, acting in his interests and for the protection of his property, was impliedly authorized to engage a substitute or to become the required substitute himself. But this aspect of the evidence was not brought to the attention of the Court.

In *Reaume* v. *Newcomb* (1900) 124 Mich. 137, 82 N.W. 137, defendants, dry-goods merchants, employed boys to drive their delivery wagons; the horses and wagons being in the care of the owner of a boarding stable. The employment of the boys lasted only from the time they received their horses and wagons at the stable until they delivered them back again in the possession of the stable keeper. One of the boys, after he had completed his deliveries, rode one of the horses, at the instance of the stable keeper, for the purpose of exercising him, and, while so riding the horse, collided with plaintiff on his bicycle. *Held*, that, as the boy was not in the employ of defendants at the time of the accident, they were not liable. The Court said: "Pierce alone was responsible for the boy's act in riding the horse. Defendants did not authorize or permit him to employ the drivers for any such purpose. Hundreds and thousands of men are em-

servant, and that such an invitation was not within the scope

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ployed to work a portion of the day for one employer, and are at liberty to work the balance of the time for others or for themselves. If this boy had been permitted by Pierce to take the horse and wagon on business for himself or for Pierce outside of the delivery hours, defendants would not be liable for any negligence of the boy, because it would be without the scope of the authority of either Pierce or Wescott. That the act to be done by the boy might possibly result, or was intended to result, in benefit to defendants, is not the test of authority. The act must be within the scope of his employment, in order to render his employer liable."

In *Peterson* v. *Hubbell* (1896) 12 App. Div. 372, 42 N.Y. Supp. 554, the regular driver of an express wagon not being present at a time when that wagon was to be driven to a railway station, a clerk in the office of the express company undertook to drive the wagon to its destination, and in so doing ran over the plaintiff. The clerk had never been regularly employed as driver, but had, on numerous occasions, driven the company's wagons on regular trips for the delivery of freight at the station. *Held*, that in the absence of any prohibitive rule of the company, or of any proof upon the part of the defendant that its officers and agents were ignorant of such action on the part of the clerk, there was sufficient evidence of the implied authority of the clerk to drive the wagon to justify the court in refusing to dismiss the complaint upon the ground that the person driving the wagon was not a servant of the company acting within the scope of his authority.

In *MacEnroe* v. *Taylor* (1907) 107 N.Y. Supp. 565, 56 Misc. Rep. 680, where plaintiff was injured by defendant's automobile, operated by defendant's chauffeur, defendant testified that the chauffeur was acting without his authority, and against his express commands. *Held*, that the failure of defendant, at the time he was served with the summons and complaint, to deny that the chauffeur was acting at the time of the accident as his employé and in the performance of duties for him, could not be considerd as proof that the agent had authority. An instruction to the opposite effect was held to be erroneous.

In *Brenner* v. *Ford* (1906) 116 La. 500, 40 So. 894, it was held that the plaintiff could not recover for the death of a minor child who had been run over by a vehicle which a man employed by the defendant, not as a driver, but as a groom and stableman, had, in disobedience of positive order given at the time when he was hired, and reiterated on several subsequent occasions, taken out for his own pleasure. The court thus discussed the respective contentions of the parties: "The defendant denies that this act of the negro was in disobedience of orders or instructions which were given to him as to the performance of duties which had devolved upon him in the discharge of his existing duties which left his acts to be tested and passed on as if such orders had not been given. He urges that the attempt of the plaintiffs to place matters on that footing is without justification and warrant; that the orders and instructions

of his authority.[2]

not to drive the horse was one of the original limitations which had been placed by himself upon the authority which he conferred upon the servant, and one of the conditions of his employment; that by disobeying such instructions, he could not extend and bring inside the sphere of his duties the thing which was prohibited, and which marked the scope and fixed the extent of the servant's employment. Defendant insists that when the terms of the employment had been fixed, and by the same Weeden had been expressly prohibited (*ab initio*) from driving the horse, it could not be pretended, (when he undertook afterwards to drive her), that he was doing so on the master's business, or for his interest. On the contrary, it must be conclusively presumed that he was driving the horse for his own pleasure. Plaintiff's claim that the defendant having told the servant not to drive the horse, and then told him to exercise her without limiting him to any specific method of exercising her only by leading or riding, necessarily left the servant under the belief that he was to exercise her by driving as the only appropriate or expedient way in which she could be exercised at all or the only way the horse was accustomed to be used. We do not think the testimony justifies the taking of this position. Weeden was prohibited from the beginning from driving the animal, and that prohibition was never removed. On the contrary it was continuously reiterated. Weeden could not possibly have made any mistake on that subject. Even had he made a mistake, it was one not justified by the facts." It is not apparent why the defendant should have taken his stand upon the disputable ground of the servant's scope of authority, when he might, in view of the facts, have resorted to the defence that the servant had taken the vehicle out for his own pleasure. See § 10, *post*.

In *Dalrymple* v. *McGill* (1813) Hume's Sc. Sess. Cas. 387, the master was held not to be liable for the act of a servant who, without orders, took a horse of his neighbour, and rode it so hard, that the horse was permanently injured.

[2]In *Bowler* v. *O'Connell* (1894) 27 L.R.A. 173, 44 Am. St. Rep. 359, 162 Mass 319, 38 N.E. 498, the defendants were held not to be liable for injuries resulting to a child from the kick of a horse on which he had been invited to ride by one a teamster who was leading it to a water-tub. The court said: "There was nothing to shew that it was any part of their business, or that it was their habit or custom, to furnish horses or colts to ride, or to allow boys to ride upon them, or that they in any way ever authorized or permitted Frank to do this. Under this state of things, we are unable to see how the invitation by Frank to the plaintiff to ride upon the colt, although given while Frank was engaged in his employment, can be considered to be an act done in the course of such employment, or for the purpose of doing the business of his masters. The true test of liability on the part of the defendants is this. Was the invitation given in the course of doing their work, or for the purpose of

4. Injury inflicted on a journey undertaken in the course of the servant's duties, and prosecuted without any deviation.—Where it appears that the vehicle or horse which caused the injury in question was owned by the defendant, that its management was a

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accomplishing it? Was this act done for the purpose, or as a means, of doing what Frank was employed to do? If not, then in respect to that act he was not in the course of the defendants' business. An act done by a servant while engaged in his master's work, but not done as a means or for the purpose of performing that work, is not to be deemed the act of the master. And under this rule, in view of the testimony, the defendants were not responsible for the consequences of Frank's invitation to the plaintiff to ride upon the colt.

In *Driscoll* v. *Scanlon* (1896) 165 Mass. 348, 43 N.E. 100, it was held that the driver of a dump cart was not within the scope of his employment in inviting a boy nine years old to ride upon the cart, either for pleasure or to drive his horse, so as to make his employer liable for injuries to the boy by falling off and being run over while the driver was asleep. The court said: "It was argued that we might look only to the later moment when the plaintiff was under the wheels, that it did not matter how he got there, and that the defendant was liable for running over the plaintiff, if he would have been in case his cart had run over a third person when his driver was asleep. But it does make all the difference in the world how the plaintiff got under the wheels. The defendant was not bound to expect or look out for people falling from his cart, where they had no business to be, and persons who got into it took the risk of what might happen as against him. The driver's slumber was so intimately connected with the unauthorized act that it is impossible to separate the two. The driver would not have been asleep and the plaintiff would not have fallen but for the driver's unauthorized act, and if the plaintiff had not been driving. The plaintiff does not stand in the same position as if he had been run over when crossing the road."

In *Marquis* v. *Robidoux* (1900) Rap. Jud. Que. 19 C.S. 361, a boy, 10 years old, after having been ejected, with other boys, from defendant's delivery wagon, secretly re-entered the wagon without the driver's knowledge, and, after having been observed by him, had been tacitly permitted to remain because he was unwilling to leave him in the public road far from his father's home. The boy was injured by a collision between the wagon and a railroad train without any negligence on the part of the driver. *Held*, that the defendant was not liable for this injury as the driver was not within the scope of his duties in permitting the boy to remain in the wagon.

For other cases of a similar type in which the master's liability was denied, see *Schulwitz* v. *Delta Lumber Co.* (1901) 126 Mich. 559, 85 N.W. 1075; *Mahler* v. *Stott* (1902) 129 Mich. 614, 89 N.W. 340; *Foster-Herbert Cut Stone Co.* v. *Pugh* (1906), 91 S.W. 199, 115 Tenn. 688.

function of the tortfeasor under the terms of his contract, and that, at the time when the injury was inflicted, he was using it at a place to which he was authorized to take it, his negligence will or will not be imputable to his master, according as the particular act from which the injury resulted was one which was incidental to his appointed work, or one which was done with a view to the attainment of some personal advantage or to the gratification of some personal desire or feeling.

For cases illustrating this rule see the following notes.

In the Nisi Prius case, *Lamb* v. *Palk* (1840) 9 C. & P. 629 (E.C.L.R. vol. 38), a van was standing at the door of A., from which A.'s goods were unloading, and A.'s gig was standing behind the van: B.'s coachman, who was driving B.'s carriage, came up, and, as there was not room for the carriage to pass, the coachman got off his box, and laid hold of the van horse's head: this caused the van to move, with the result that a packing-case fell out of the van upon the shafts of the gig, and broke them. It was ruled by Gurney, B., after consultation with some other members of the Court of Exchequer, that B. was not liable for this, as the coachman was not acting in the employ of B. at the time the accident occurred. In *Page* v. *Defries* (1866), 7B. & S. 137, the court without giving any specific reason overruled this decision.

In *Schaefer* v. *Osterbrink* (1886) 67 Wis. 495. it was held to be competent for the plaintiff to prove that, prior to the accident, the tortfeasor had been in the habit of driving his team to church and elsewhere, and also to show the extent and character of the driving, as bearing upon the nature of his service and the scope of his authority.

In *Collard* v. *Beach* (1903) 81 App. Div. 582, 81 N.Y. Supp. 619, where the plaintiff's horse was frightened by the management of an automobile owned by the defendant, it appeared that immediately before the accident the defendant, accompanied by his son and his coachman, had gone to the railway station in the automobile and had there left it; that, at the time when the accident occurred, the defendant's son and coachman were occupying it; and that the son was guiding and controlling it. It was a disputed question whether the defendant on leaving the machine had committed the custody thereof to his son or to his coachman. *Held*, that the following instruction was a proper one: "If the jury find either that the defendant left the automobile in charge of his son to take it home, or in charge of his son and coachman together to take it home, or in charge of the coachman alone, and the coachman neglected his duty in that regard and allowed the son to run the machine, and by the negligence of the son the accident occurred, without contributory negligence on the plaintiff's part, then in either case the defendant is responsible.

In *Louisville Water Co.* v. *Phillips* (1905) 89 S.W. 700, 28 Ky. L. Rep. 557 (No. off. rep.) defendant merely attempted to disprove the contention

This criterion has been applied under the following circumstances:—where the plaintiff's injury was caused by the faulty driving of the defendant's vehicle;[2] where

that decedant was killed by its servants, without giving any evidence to show that, if the killing was done by its servants, it was not done when engaged in its business, and plaintiff proved that defendants' inspector was the person who drove over decedant, and that the vehicle was the vehicle of defendant, and it was shewn that the inspector's vehicle was never used, except in the service of the company. *Held*, that a primâ facie case authorizing a recovery was established, and that an instruction that, if decedant was killed by the inspector, who was pursuing his own ends exclusively, defendant was not responsible, was properly refused.

[2]In *Jones* v. *Hart* (1699) 2 Salk, 441 (apparently the same as an anonymous case reported in 1 Ld. Raym. 739), Holt, C.J., thus stated the effect of two earlier decisions which were not cited by name: "The servant of A. with his cart ran against another cart, wherein was a pipe or sack, and overturned the cart, and spoiled the sack. An action lay against A. So, where a carter's servant run his cart over a boy; it was held, the boy should have his action against the master, for the damage he sustained by his negligence."

In *Young* v. *South Boston Ice Co.* (1890) 150 Mass. 527, where the driver of a delivery wagon passed over to the wrong side of the highway for the purpose of passing a stationary venicle and ran into the plaintiff's carriage, the trial judge refused to instruct the jury, as requested by the defendant, that if there was sufficient space to drive said ice-cart to the right and avoid a collision, and it was not necessary for the defendant's servant to drive said ice-cart across said middle of the travelled part of the highway in order to transact his master's business, such act of the servant, if the injury complained of was thereby inflicted, was not one for which the defendant could be held responsible. *Held*, that the defendant had no ground of exception. The court said: "If all the facts were proved according to the assumption in the defendant's request, we think they were not necessarily inconsistent with the plaintiff's theory. Upon the question raised, the jury might consider all the evidence, and it was competent for them to find that, at the time of the collision, the driver drove against the plaintiff's carriage in trying to do the defendant's business, and that he was acting within the general scope of his employment. The request for instructions was rightly refused."

In *Wolfe* v. *Mersereau* (1855) 4 Duer, 473, the ground upon which a motion for a new trial was made was that the trial judge had given a charge to the effect "that, if there was no negligence on the part of the plaintiff in regard to his wagon being where it was, and, if the defendants' servant ran against that wagon to save himself from greater peril, the defendant was liable, even if the act was a prudent one in order to stop the horses." The court said: "Although the instructive impulse of self-pre-

a coachman, finding that his master's carriage was en-

servation prompted the act as security against a greater personal peril, it became, at the moment, an act of duty, if not of necessity. But the act was made necessary by previous negligence for which the master is liable, and which may properly be regarded as the cause of the injury."

The case of *Michel* v. *Alstree* (1677) 2 Lev. 172, 3 Kel. 650, Ventr. 295, where the plaintiff was injured by a pair of intractable horses which the defendant's servant was training in a city square, may possibly be cited as an authority relevant to the situation specified in the text. But the defendant there seems to have been held liable on the ground of his personal negligence in ordering the servant to take the animals to such a place for the purpose of breaking them in, rather than on the ground of the principle, Respondeat Superior. See the comments of the court in *Parsons* v. *Winchell* (1850) 5 Cust. 592.

In *Barlow* v. *Emmert* (1872) 10 Kan. 358, a declaration which averred in substance that the owners of a stage-coach started the horses at a gallop, and that the driver cracked his whip very loud, and often, at the same "yelling, whooping, screaming, and swearing," and so frightened the plaintiff's team that it ran away, was held to state a good cause of action.

For cases in which the liability of the employé was affirmed, but which did not involve any special point that calls for particular mention. (Unless otherwise stated the injury was one caused by the negligence of the driver of a horse-drawn vehicle). See the following:

Brucker v. *Fromont* (1790) 6 T.R. 659; *North* v. *Smith* (1861) 10 C.B. N.S. 572, 4 L.T.N.S. 407 (groom applied spur to a horse and caused it to kick so as to injure plaintiff); *Springett* v. *Ball* (1865) 4 Fost. & T. 472; *Pike* v. *London Gen. Omnibus Co.* (1891) 8 Times L.R. 164 (doctrine of imputed negligence not a bar to the action); *Perkins* v. *Stead* (1906) 23 Times L.R. 433 (automobile); *Robinson* v. *Huber* (1906) 63 Atl. 873 (rule laid down in charge to jury); *Livingston* v. *Bauchens* (1889) 34 Ill. App. 544 (servant was permitted to use master's horse and carriage in collecting rents); *Dinsmoor* v. *Wolber* (1899) 85 Ill. App. 152; *Brudi* v. *Luhrman* (1901) Ind. App. 59 N.E. 409; *Johnson* v. *Small* (1844) 5 B. Mon. (Ky.) 25; *Ewing* v. *Callahan* (1907 Ky.) 105 S.W. 387, 978; *Shea* v. *Reems* (1884) 36 La Ann. 966 (peddler driving to his employer's store to get goods); *Loyacano* v. *Jurgens* (1896) 50 La. Ann. 441, 23 So. 717; *Costa* v. *Yoachim* (1900) 28 So. 992, 104 La 170; *Parsons* v. *Winchell* (1850) 5 Cush. 592, 52 Am. Dec. 745; *Kimball* v. *Cushman* (1869) 103 Mass. 194, 4 Am. Rep. 528; *Huff* v. *Ford* (1878) 126 Mass. 24, 30 Am. Rep. 645; *Phelps* v. *Wait* (1864) 30 N.Y. 78; *Smith* v. *Consumers' Ice Co.* (1885) 52 N.Y. Super. Ct. 430; *Clarke* v. *Kochler* (1887) 46 Hun., 536; *Stewart* v. *Baruch* (1905) 103 App. Div. 577, 93 N.Y. Supp. 161 (plaintiff run over by automobile); *Pickens* v. *Diecker* (1871) 21 Ohio St. 212, 8 Am. Rep. 55; *Eckert* v. *St. Louis Transfer Co.* (1876) 2 Mo. App. 36; *Rochester* v. *Bull* (1907) 58 S.E. 766, 78 S.C. 249 (plain-

tangled with that of the plaintiff, struck the plaintiff's horse

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tiff's horse was frightened by automobile and ran away); *Anderson* v. *Brownlee* (1822) 1 Sc. Sess. Cas. 1st Ser. 442 [474]; *Fraser* v. *Dunlop* (1822), 1 Sc. Sess. Cas. 1st Ser. 243 [258]; *Baird* v. *Hamilton* (1826) 4 Sc. Sess. Cas. 1st Ser. 797 (790). *McLaren* v. *Rae*, (1827) 4 Mur. (Sc.) 381.

For cases in which the rule of Respondeat Superior was assumed, and the right of recovery turned upon the question of negligence vel non, see *Crofts* v. *Waterhouse* (1825) 3 Bing. 319, 11 Moore, 133; *North* v. *Smith* (1861) 4 L.T. 407; *Aston* v. *Heaven* (1797) 2 Exp. 533; *Christie* v. *Griggs* (1809) 2 Camp. 79; *Jackson* v. *Tollett* (1817) 2 Stark. 37; *Christian* v. *Irwin* (1888) 125 Ill. 619; *Cooke Brewing Co.* v. *Ryan* (1906) 79 N.E. 132, 223, Ill. 382, affirming 125 Ill. App. 597; *Eaton* v. *Crips* (1895), 62 N.W. 687; *Mattingly* v. *Montgomery* (1907) 68 Atl. 205, 106, Md. 461; *Shaw* v. *Hollenbach* (1900): Ky.), 55 S.W. 686; *American Strawboard Co.* v. *Smith* (1901) 94 Md. 19, 50 Atl. 414; *Moebus* v. *Herrmann* (1888) 108 N.Y. 349; *Coulter* v. *American Merchants Union Exp. Co.* (1871), 5 Lans. 67; *Moriarty* v. *Zepp* (1891), 42 N.Y., S.R. 824; *Harpell* v. *Curtis* (1850) 1 E.D. Smith, 78; *McCahill* v. *Kipp*, (1854) 2 E. D. Smith, 413; *Canton* v. *Simpson*, 2 App. Div. 561, 38 N.Y. Supp. 13; *Berman* v. *Schultz*, 81 N.Y. Supp. 647, 40 Mese. 212, 84 N.Y. Supp. 292, (child started an automobile left in the street, and was injured); *Steinacker* v. *Hills Bros. Co.* (1904) 87 N.Y.S. 33, 91 App. Div. 521; *Titus* v. *Tangeman* (1906) 101 N.Y.S. 1000, 116 App. Div. 487 (automobile); *Wissler* v. *Walsh* (1895) 165 Pa. 352, 30 Atl. 981; *McCloskey* v. *Chautauqua Lake I. C.* (1896) 174 Pa. 34, 34 Atl. 287; *Prinz* v. *Lucas* (1905) 60 Atl. 309, 210 Pa. 620; *Hyman* v. *Tilton* (1904) 57 Atl. 1124, 208 Pa. 641, (boy who had climbed on to loaded dray was struck at by the driver's whip and fell off); *Lownds* v. *Robinson* (1876) 2 R. & C. Nov. Sc. 364.

For cases which turned upon the question whether the negligence of the driver was the proximate cause of the injury, see *Landy* v. *Swift* (1908) 159 Fed. 271, (foot-passenger while crossing a street fell on attempting to get out of the way of an approaching vehicle); *McDonald* v. *Snelling* (1867) 14 Allen, 290, 92 Am. Dec. 768, (defendant liable where his servant negligently drove a sleigh against another sleigh, thereby causing the horse to run away and injure the plaintiff, who was in a third sleigh); *Post* v. *Olmsted* (1896) 66 N.W. 828, 47 Neb. 893; *Taylor* v. *Long Island R.C.* (1897) 16 App. Div. 1, 44 N.Y. Supp. 820, (train struck wagon negligently driven across track, and threw some of the contents against a person near the track).

For a case in which the plaintiff was held to be precluded from recovering for the damage caused to his mowing machine, on the ground that, although the negligence of the defendant may have been in part the cause of the team's having run away, that event was also a result of the negligence of the plaintiff's servant in leaving the team unhitched

with his whip, thereby causing them to move forward and overturn the plaintiff's carriage;[3] where the master's horses were left unfastened and unattended on a public road and ran away;[4]

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and unattended in the highway, see *Page* v. *Hodge* (1885) 63 N.H. 610, 4 Atl. 805.

[3] *Croft* v. *Alison* (1821) 4 B. & Ald. 590. At the trial, it was left to the jury to determine, whether the carriages had become entangled from the moving of the horses of the plaintiffs, which, previously to the accident, were standing still and without a driver, and the judge directed them to find for the defendant, in case they thought so, and were of opinion that the whipping by the defendant's coachman was for the purpose of extricating himself from that situation. But he directed them to find for the plaintiffs, in case they were of opinion, that the entangling arose originally from the fault of the defendant's coachman. The jury found a verdict for the plaintiffs. A motion for a new trial having been made, the court laid down the law as follows: "The distinction is this; if a servant driving a carriage, in order to effect some purpose of his own, wantonly strikes the horses of another person, and produce the accident, the master will not be liable. But if, in order to perform his master's orders, he strikes, but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in pursuance of the servant's employment. The case, therefore, has been properly left to the jury."

[4] *Pierce* v. *Conners* (1894) 20 Colo. 178, 37 Pac. 721.

See also the following cases in which the master was held liable in spite of a deviation by the servant: *Whatman* v. *Pearson* (1868) L.R. 3 C.P. 422, 37 L.J.C.P. 156, 18 L.T.N.S. 290, 16 Week. Rep. 649; *Ritchie* v. *Waller* (1893) 63 Conn. 155, 27 L.R.A. 361, 38 Am. St. Rep. 361, 28 Atl. 29; *Loomis* v. *Hollister* (1903) 75 Conn. 718, 55 Atl. 561; *Williams* v. *Koehler* (1899) 41 App. Div. 426.

In an action for injuries caused by a runaway team, evidence of a servant's long-continued and notorious habit of leaving his horse unhitched in the street was held to be admissible, as tending to shew that it was done with the master's knowledge and permission, and also that it was done within the scope of his employment. *Schulte* v. *Holliday* (1884) 54 Mich. 73. It is apprehended, however, that such evidence was wholly superfluous under the given circumstances, as, even apart from it, the driver might have been properly found to have been acting within the scope of his employment.

If the servant's omission in this respect constituted a breach of a duty imposed by a statute or a municipal ordinance, the master's liability will, under the doctrine accepted in most jurisdictions with regard to defaults of that description, will be inferred, as a matter of law.

the right of recovery being in one case affirmed, although the servant had left the horse in order to accomplish a purpose entirely personal;[5] where the driver of a truck left it in the street at night, instead of complying with the directions he had

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See *Healy* v. *Johnson* (1905): Iowa.) 103 N.W. 92. The fact that the master had provided the servant with the means of securing the horse, and that the running was the result of the servant's having disobeyed the master's instructions to use those means, was held to be no defense to the action.

[5] *Hayes* v. *Wilkins* (1907) (194 Mass. 223) 80 N.E. 449. Discussing the facts, the court said: "He was on the way to the defendant's stable, after having completed the regular work for the day by delivering some merchandise at a freight house. While the route that he took was not the shortest, it was but little longer than the other, and the jury might have found that he chose it because the other was blocked by teams, and that therefore he was within the scope of his employment up to the time when he left the horse. He went into a pool room to get some tobacco, and this movement, treated as an independent act, was not for the master's benefit, nor within the scope of his employment as a servant. But his custody of the horse, up to the time that he left him, was in the performance of the defendant's business, and any negligence in for the consequences of which the defendant is liable. While he had the horse in custody for his master, and was charged with the duty of continuing this custody as a servant, he negligently omitted to continue it, and as a consequence the horse ran away. His purpose on going into the pool room is immaterial. His negligence occurred while he was directly engaged in his master's business, by the mere omission of that which he should have done in the business. If the attempt were to charge the master for negligence in the performance of the act of going to buy tobacco, the case would be different. If the driver had carelessly injured property in the pool room the defendant would not be liable, because his going into the pool room, considered as a positive act, was not within the scope of his employment. But the omission and failure to continue the proper custody of his horse when he had him in custody for the master, was an omission to perform his duty as a servant while he was acting for his master. This omission, quite apart from the purpose which accompanied it, was a direct and proximate cause of the plaintiff's injury. The case is different from *McCarthy* v. *Timmins*, 178 Mass. 378. 59 N.E. 1038, 86 Am. St. Rep. 490, (see § 6, note 1, post), in which the driver, for his own purposes, had driven the team away from the streets on which he should have driven it for his master, and had ceased to act within the scope of his employment before the negligent omission that caused the accident."

received to place it in a certain yard;[6] where sacks of bran which the driver of a delivery wagon had temporarily deposited by the roadside frightened a passing horse.[7]

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[6] *Powell* v. *Deveney* (1849) 3 Cush. 300. There the shafts of the truck left in the street were thrown against the plaintiff by another truck, not belonging to the defendant. The court said: "The servant was rightfully in possession of the truck and being thus rightfully in possession and about his master's business, the master must be responsible for his neglect in improperly leaving the truck in the street. The defendant can no more be exempted from liability, because his servant disobeyed his orders in not placing his truck on the lot provided for it, than a master can be exempted from liability, for damage done by his servant in driving carelessly against a carriage, when he has been ordered to drive carefully, and to avoid coming in contact with any carriage. The servant being about the business of his master, the master must be responsible for his acts, and cannot exempt himself by any order he may give the servant."

[7] In *Phelon* v. *Stiles* (1876) 43 Conn. 426, (verdict for plaintiff sustained). There the driver, after having laid down the sacks had gone up a side road to deliver a quantity of flour, intending to take the bran on his return, his object being to save an unnecessary transportation of the bran, and thus to finish the delivery sooner and get time to attend to some private business of his own. Discussing the contention of the defendant that the servant's acts were done on his own account, the court said: "But what business of his own was he then doing? He was not then attending to private business in going to Hartford. That was to be undertaken later in the day. He left the bags to expedite the delivery. Did it make the business his own because he despatched it more speedily than it would naturally have been done? He was sent by the defendant to deliver the flour and bran. Did he do anything else than deliver them? His whole object in leaving the bran by the side of the road was to gain time. Suppose he had driven the horse with such speed as amounted to carelessness in order to gain time, and had injured a person by so doing, would he be transacting his own business while driving so rapidly, so that the defendant would not be liable? Suppose he had left the bran out of consideration for his horse, and the same result had followed, would the defendant be excused? He was under the necessity of taking the bran to Mr. King's, or of leaving it by the side of the road until his return; suppose he had taken the latter course without any special object in view, would it make any difference in the case? We think all that can be said of the matter is, that Babcock performed the defendant's business in delivering the bran in a shorter time than he would have done, had he not intended to go to Hartford later in the day; and certainly the rapidity with which the business was trans-

If the given injury was inflicted while the servant was engaged in the performance of his duties, the mere fact that the particular conduct which caused it was incidental to the pursuit of some secondary object which concerned only the servant himself or a third person will not absolve the master from responsibility. Under such circumstances liability may still be imputed, if it appears that, at the time when the accident occurred the secondary object of the servant was being pursued concurrently and simultaneously with the discharge of his appointed functions.[8]

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acted cannot operate to excuse the defendant." Referring to a further contention on the part of the defendant, that "the bags, left as they were by the side of the road, became a public nuisance, and that he could not be liable for a public offence committed by his servant, the court observed that the servant "did not intend to create a nuisance. The case does not find that he intended any harm. All that can be said is, that he negligently left them while performing the business of the defendant, and for such negligence the defendant is of course liable. We think there is nothing in this claim." But the theory apparently here entertained by the court, that the master's liability is necessarily and invariably negatived, if it appears that the servant's misconduct amounted to a crime, is clearly untenable.

[8] In *Gracey v. Belfast Tramway Co.* (1901) 2 Ir. Rep. 322, two servants of the defendant company, having taken two horses out of its stables to ride them to a neighbouring forge to be shod, raced the animals furiously along the public road, and frightened the plaintiff's horse, the consequence being that the plaintiff was thrown out of her trap and injured. Held, that the defendant was liable for the negligence of its servants. Palles, C.B., observed: "If we eliminate what has been called 'the purpose of running a race,' admittedly they (the master) would be liable. In such a case, the act of bringing the horses to the forge would undoubtedly have been one in the course of their employment. No doubt in that case the sole purpose for which the act would have been done would have been a purpose of the masters. But the ground of the masters' liability in such a case would not have been based on any such subtlety as that of a single purpose, as distinguished from several purposes, but because the servants would have been doing their masters' business: *Story* v. *Ashton*, 10 B. & S. 340. The act would have been done for the master. What, then, is the effect of the servants being actuated by the second purpose; that of riding a race? This second purpose was consistent with the first. Although each servant urged the horse he was riding to go faster than the other horse, both were riding

A mere passenger in a vehicle is not entitled to maintain an action to recover for damage done to it through the negligence of a servant in respect of the management of another vehicle belonging to or hired by his master. But in the case where this rule was laid down it was held that persons who had hired the damaged vehicle for the day, and also appointed the driver and furnished the horses, might for the purpose of the action be considered as the owners and proprietors of the vehicle.[9]

5. Liability as affected by the servant's deviation from a prescribed route. Generally[1].—If the journey during which the injury in question was inflicted was commenced in the course of the servant's employment, the mere circumstance that the act which caused the injury was done at a place where he would not have been if he had been following the route prescribed by his master is not sufficient to preclude the aggrieved party from recovering.

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to the forge to have the horses shod. The act, then, which caused the injury was an act for the benefit of the masters, but also, I will assume, for the purpose of the servants. So far as the act was for the benefit of the masters, the act of the servant was, in law, that of the masters; and I cannot see that it ceased to be the masters' act because, for another purpose, it was an act of the servants. The act of going was the masters' act; but for their own purpose the servants performed that act more rapidly than they would otherwise have done—that is, in a negligent manner. In other words, whilst, by reason of the continuance of the master's purpose the act retains the quality of that of the masters, the servants' own purpose qualifies the manner of doing it, and renders such manner negligent. But this is the very state of facts in which a master is responsible. If the second purpose had been that of a third party; as, for instance, if a third party had asked the servant to carry a parcel for him to the forge, surely its effect could not have been to make the continuing purpose of taking the horses to the forge any less the purpose of the defendants."

[9] *Croft* v. *Alison* (1821) 4 B. & Ald. 590.

[1] In *Joel* v. *Morrison* (1833) 6 C. & P. 501, a portion of the remarks made by Parke, B., in directing the jury were as follows: "If the servant, being on the master's business took a detour to call upon a friend, the master will be responsible. . . . If he was going out of his way, against his master's implied commands, when driving on his master's

This doctrine is merely an application of the general principle that a tortious act done in the course of the servant's employment, is none the less imputable to his master because it was done in violation of the master's orders.

6. Same subject. Effect of servant's deviation from a prescribed route for his own purposes.—From the conclusions arrived at, and the language used, in several cases, it seems scarcely possible to draw any other deduction than that the courts by which they were decided were proceeding upon the broad ground that, the master's non-liability should be inferred as a matter of law, whenever it appears that the given deviation was made for the purpose of doing something which had no connection with the servant's duties. In this point of view, the relationship of mas-

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business, he will make his master liable." Cited with approval by Bovill, C.J., in *Whatman* v. *Pearson* (1868) L.R. 3 C.P. 422.

In *Mitchell* v. *Crassweller* (1853) 13 C.B. 237, Jervis, C.J., observed: "No doubt a master may be liable for injury done by his servant's negligence, where the servant, being about his master's business, makes a small deviation, or even where he so exceeds his duty as to justify his master in at once discharging him."

In *Storey* v. *Ashton* (1869) L.R. 4 Q.B. 476, Cockburn, C.J., said: "I am very far from saying, if the servant, when going on his master's business took a somewhat longer road, that owing to this deviation he would cease to be in the employment of the master, so as to divest the latter of all liability."

In *Long* v. *Nute* (1907) 123 Mo. App. 204, 100 S.W. 511, it was laid down that the presumption which is entertained that a person employed for the purpose of operating a vehicle is, while operating it, acting within the scope of his authority about his employer's business, is not changed by the fact that he was making a detour when the injury was inflicted. In that case the accident occurred while a chauffeur was by the order of defendant's wife bringing an automobile from a garage to his house.

The rule in the text has been recognized in *Geraty* v. *National Ice Co.* (1897) 16 App. Div. 174, 44 N.Y. Supp. 659, (affirmed without opinion in 160 N.Y. 658); *McCarthy* v. *Timmins* (1901) 178 Mass. 378.

In *Mitchell* v. *Crassweller* (1853) 13 C.B. 237, 17 Jur., N.S. 716, 22 L.J., C.P. 100, the defendants' carman, having finished the business of the day, returned to their shop in W. Street, with their horse and car, and obtained the key of the stable, which was close at hand; but, instead of going there at once, and putting up the horse, as it was his duty to do, he, without his masters' knowledge or consent, drove a fellow-workman

ter and servant is presumed to be temporarily suspended from moment that the deviation is commenced, and the object of the

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to E. Square; and, on his way back, ran over and injured the plaintiff and his wife. *Held*, that the defendants were not responsible for the consequences of the unauthorized act of the carman. Jervis, C.J., said: "I think, at all events, if the master is liable where the servant has deviated, it must be where the deviation occurs in a journey on which the servant has originally started on his master's business; in other words, he must be in the employ of his master at the time of committing the grievance." Maule, J., said: "At the time of the accident, he was not going a roundabout way to the stable, or, as one of the cases expresses it, making a detour. He was not engaged in the business of his employers. But, in violation of his duty, so far from doing what he was employed to do, he did something totally inconsistent with his duty, a thing having no connection whatever with employer's service. The servant only is liable, and not the employers. All the cases are reconcilable with that. The master is liable even though the servant, in the performance of his duty, is guilty of a deviation or a failure to perform it in the strictest and most convenient manner. But, where the servant, instead of doing that which he is employed to do, does something which he is not employed to do at all, the master cannot be said to do it by his servant, and therefore is not responsible for the negligence of the servant in doing it." Creswell, J., said: "No doubt, if a servant, in executing the orders, express or implied, of his master, does it in a negligent, improper, and roundabout manner, the master may be liable. But, here, the man was doing something which he knew to be contrary to his duty, and a violation of the trust reposed in him. The expression used by him at the time he started upon the unauthorized journey, showed that he was aware that he was doing that which was inconsistent with his duty. I think it would be a great hardship upon the employers to hold them to be responsible under such circumstances."

This case was followed in *Sheridan* v. *Charlick* 1872) 4 Daly. (N.Y.) 338, where the facts were quite similar.

In *Storey* v. *Ashton* (1869) L.R. 4 Q.B. 476, 10 B. & S. 337, 38 L.J. Q.B. 223, 17 Week. Rep. 727, a wine merchant sent his clerk with his horse and cart under the care of his carman to deliver wine and bring back empty bottles. On their return, when within a quarter of a mile from his master's stable, the carman, at the request of the clerk and for his business, drove the horse and cart in another direction, and when two miles from the stable injured a person by negligent driving. *Held*, that the master was not liable, as the act of the servant was not done in the course of his employment, but on a new and an independent journey. Cockburn, C.J., said: "The true rule is that the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment as servant. *I am very*

deviation is the only question of fact with regard to what it is necessary or proper to obtain the finding of a jury.

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far from saying, if the servant when going on his master's business took a somewhat longer road, that owing to this deviation he would cease to be in employment of the master, so as to divest the latter of all liability; in such cases, it is a question of degree as to how far the deviation could be considered a separate journey. Such a consideration is not applicable to the present case, because here the carman started on an entirely new and independent journey which had nothing at all to do with his employment. It is true that in *Mitchell* v. *Crassweller*, 13 C.B. 237; 22 L.J. (C.P.) 100, the servant had got nearly if not quite home, while, in the present case, the carman was a quarter of a mile from home; but still he started on what may be considered a new journey entirely for his own business, as distinct from that of his master; and it would be going a great deal too far to say that under such circumstances the master was liable." Mellor, J., said: "Here, though the carman started on his master's business, and had delivered the wine and collected the empty bottles when he had got within a quarter of a mile of the defendant's office, he proceeded in a directly opposite direction, and as soon as he started in that direction he was doing nothing for his master; on the contrary every step he drove was away from his duty." Lush, J., said: "Here the employment was to deliver the wine, and carry the empty bottles home; and if he had been merely going a roundabout way home, the master would have been liable; but he had started on an entirely new journey on his own or his fellow-account, and could not in any way be said to be carrying out his master's servant's account, and could not in any way be said to be carrying out his master's employment." It is worthy of observation that, in the case as reported in 10 B. & S. the italicized sentence, supra, in the judgment of Cockburn, C.J., is given as follows: "I am far from saying that if the servant, while on his master's business, made a deviation from it for his own purpose he might not be liable." In the Law Journal the corresponding passage is given as follows: "I think that, if a driver, while acting on his master's business, were to make a slight deviation in order to carry some business of his own into effect, in such a case master might be liable, and that the question would be one of degree as regards the extent of the deviation." The words concerning the servant's own business which are inserted in these two versions obviously modify in a very important manner the language of the Law Reports. If the official version is correct, it will amount merely to a recognition of the doctrine stated in the preceding section, and, as this seems to be clearly the meaning of the remark of Lush, J., as to the effect of "going a roundabout way home," it would not be unreasonable to infer that this was the state of facts adverted to by the Chief Justice. On the other hand, if the words are correctly set out in the Law Journal, they can hardly be construed in any other sense than as the expression of the view that a court is not justified in setting aside a verdict in favour

The theory apparently adopted in other cases is that a plaintiff's right to recover is not necessarily excluded

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of the aggrieved party unless the deviation was very considerable in point of space. The variations are a striking commentary upon the loose manner in which many English cases have been reported even in very recent times.

In *Hatch* v. *London & N.W.R. Co.* (1899: C.A.) 15 Times L.R. 246, an action was brought by a widow to recover damages for the death of her husband owing to the alleged negligence of the defendants' carman in leaving his horse and van without proper control, so that the horse ran away and ran over and killed the plaintiff's husband, it appeared that the van which caused the accident left a railway station at 11 a.m. in charge of a carman and a boy to deliver goods. His last parcel was delivered at about 12 o'clock. From there he drove to his own house for the purpose of getting some money to enable him to buy his dinner. While he was in his own house the horse and van were left in charge of the boy under a railway arch, and the horse ran away, and ran over the plaintiff's husband. It was proved that the carman's instructions were that, after having finished the delivery of the goods he was to go back to the railway station, and that the route taken by him was two and a half miles out of his way. There was evidence that the carman would have had to go with the van to a market in another part of the city at about 3 p.m. to collect goods. It was proved that the defendants' carmen frequently went back to the railway station for dinner, but that it was not necessary for them to do so, provided that they entered in the time-sheet where they had dinner. A printed notice giving directions to carmen was put in evidence to the effect that under no circumstances were carmen allowed to stop at coffee shops or publichouses to get their meals. The trial judge ruled that there was no evidence that the carman was acting within the scope of his employment when the accident happened, and directed judgment to be entered for the defendants. The Court of Appeal dismissed an application for a new trial. A. L. Smith said that at first he thought that the van was sent out on a job which would not be finished until the van had gone to the market in the afternoon. He was now satisfied, however, by the evidence that the job upon which the van was sent out in the morning was to go to the places specified, and then to return to the station. He agreed with the trial judge, that the evidence was all one way, and that the journey of the carman to his own house was a separate one undertaken by him for his own purposes, and not for the business of his employers. The evidence shewed that the intended journey to the market was a separate job and a separate journey. There was no evidence, therefore, to go to the jury. Justice Collins, L.J., concurred, remarking that these questions were generally for the jury, but there might be cases in which the act complained of was beyond all doubt outside the scope of the servant's employment. The carman here had done all he had to do when he delivered the goods. If the accident had

by the fact that the purpose of the deviation was the accomplishment of something which concerned only the servant as a third

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happened while he was returning to the station, he would have been acting within the scope of his employment. But here the carman was not returning to the station, but went two-and-a-half miles in another direction upon his own account in order to get some money for his dinner. What he did was entirely outside any possible view of the scope of his employment.

In *McCarty* v. *Timmins* (1901) 178 Mass. 378, 59 N.E. 1038, the driver of a carriage was ordered to take it to the stable and started to do so, but before reaching the stable left his course, and went in the opposite direction, for the sole purpose of getting a drink. *Held*, that his master was, in point of law, not liable for injuries caused by the running away of the team, which he negligently left unattended in the street outside the saloon. The court said: "Scott had been employed to drive the team in the carriage of passengers, and that work was ended for the day. He was then directed to go to the stables, and there can be no doubt that so long as he drove the team with that end in view, and for that purpose and for no purpose of his own, he was engaged in his master's business, even if he made a detour contrary to the direction of his master. We are not disposed to lay much stress on the fact that he went down Boylston Street rather than Commonwealth Avenue, but when he reached Massachusetts Avenue it is plain that his only purpose in turning southward instead of northward, and going seven hundred and fifty-eight feet to Dundee Street, was not only to deviate from the regular way of reaching the stable but was for a purpose of his own, namely, to get a drink. He was upon no errand of his master, and this journey was not for the purpose of getting to the stables even by a circuitous route, or, to use the language of Hoar, J., in *Howe* v. *Newmarch*, 12 Allen, 49, 57, he was doing an act wholly for a purpose of his own, disregarding the object for which he was employed and not intending by his act to execute it, and not within the scope of his employment. In such case the defendant should not be held answerable."

In *Perlstein* v. *American Exp. Co.* (1901) 177 Mass. 530, 52 L.R.A. 959, 59 N.E. 194, an action against an express company, for an injury alleged to have been caused by the negligence of the driver of one of its wagons, it was held that the defendant might shew where each of its drivers was authorized to go on the day of the accident, for the purpose of proving that no driver of the defendant had a right to drive his wagon on that day on the street where the accident occurred, and that such driver, if there, was not acting within the scope of his employment. The court said: "If the routes prescribed for the defendants' servants were such that at this time none of them could be driving through the part of Harrison Avenue without, for the time, abandoning the service in which he was engaged and going off for some purpose of his own, the defendant would not be liable, even if the team which is said to have caused the

party. Under this theory the effect of the evidence as a whole is primarily a question for the jury, and its findings are con-

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collision was one of its teams, and was driven by a person who was regularly employed in its service. The question for the jury was not whether the defendant owned the team, but whether the person who was driving it negligently was then acting for the defendant in doing the work which he was directed to do. If the servant was not then acting in the course of his employment, but was off 'on a frolic of his own,' the master would not be liable."

In *Cavanagh* v. *Dinsmore* (1878) 12 Hun. 465, the driver of a truck belonging to defendant, after having delivered some merchandise at his office had been directed to take the truck to the stable in C. street and put it up. While on his way to the stable he met another of defendant's drivers, and, at his request and as a personal favour to him, drove to H. street, about one mile distant, and took a trunk, belonging to the other driver to deliver it in F. street. The accident occurred while he was going to the latter place. *Held*, that the complaint had been properly dismissed. The court said: "The departure of the driver from the ordinary route to the stables for the purpose of doing a favour to his co-servant, as stated in the evidence, was clearly an unauthorized deviation and not within the scope of his duty. He cannot be said, within the authorities, to have been acting in the service of the defendants while engaged in going for the trunk and valise of his co-servant and in taking them to their destination. The act was not only without the authority, but without the knowledge or consent of the defendant or of any superior officer of the driver. It is well settled that the master is not liable for injuries sustained by the negligence of his servant while engaged in an unauthorized act, beyond the scope and duty of his employment, for his own or another's purposes, although the servant is using the implements or property of the master in such unauthorized act."

In *Stone* v. *Hills* (1877) 45 Conn. 47, 29 Am. Rep. 635, H. sent his servant and team to deliver a load of paper to T., four miles distant, directing his to return thence by a particular route, getting a load of wood on his way. When he arrived, T. requested him to go on with the paper to a station four miles farther, and there get some freight, pay the freight bill, and bring the freight to him. The servant, having driven to the station, left his horses unhitched, and they ran away and injured the property of S. *Held*, that the servant was not to be regarded as at the time in the employment of H., and that H. was not liable. The court said: "In the case before us the servant left the employers' premises under precise instructions as to the place to which their team was to be driven and as to the merchandize to be transported; and under instructions equally precise as to the route to be taken in returning and as to what he should bring home. These therefore covered the entire period of his contemplated absence; nothing was left to his option or discretion; nothing to chance; and in fact the deviation was not occasioned or even suggested

clusive, unless the circumstances are such that only a single inference can reasonably be drawn from them.[2] The essence of the

by any unforeseen event in connection with the employers' business; the record shews no obligation, express or implied, upon them to deliver the paper elsewhere than in North Glastonbury, nor that the journey thence to Hartford, even if successfuly accomplished, would have been for their advantage or profit; it was not connected with, did not grow out of, did not contribute to, the successful completion of their business. When therefore the servant accepted instructions from Taylor and became a carrier of merchandise for him to and from a railroad station in an adjoining town, he temporarily threw off his employers' authority, abandoned their business and left their service."

In *Patterson* v. *Kates* (1907) 152 Fed. 481, defendant's automobile broke down while he, on a journey from A. to P., and was left in charge of his driver, with directions to repair it and bring it on to P. While waiting for the ferry at a river he consented to convey a third person to a place about a mile back on the road, and while making this trip negligently ran the machine into a vehicle, a horse and buggy on the highway, by which plaintiffs were injured. *Held*, that the defendant was not liable as "the driver had temporarily abandoned his employment, and had gone off upon an expedition of his own, for a purpose in no way connected with his duty, but on the contrary opposed thereto."

In *Wills* v. *Belle Ewart Ice Co.* (1905) 12 Ont. L.R. 526, the driver of the defendants' ice-wagon, after delivering their ice along his prescribed route, instead of returning to the company's barns, got drunk, and some hours after he was due to return, and while driving out of his homeward course ran over plaintiff. *Held*, by Boyd, Ch., that the defendants were not liable.

In *Johnson* v. *Pritchard* (1887) 8 New So. Wales, L.R. 6, the defendant, a contractor engaged upon certain works, kept a horse and buggy for his private convenience, and not for use in the course of his employment. While he was temporarily absent, his manager, whom he left in charge of the works, used the vehicle without the contractor's knowledge or consent. One evening after calling at the works, he was on his way home, and meeting a friend drove with him to a public house. While they were in the house, the horse bolted and injured the plaintiff. *Held* (1), that the horse and buggy had not been entrusted to the manager in pursuance of the defendant's business, or for the execution of the defendant's orders; and (2) that assuming that they had been so entrusted, the defendant was not liable, for the reason that, when the accident occurred, the manager was not acting in the course of defendant's employment, but was pursuing his own private ends.

[2]In *Sleath* v. *Wilson* (1839) 9 C. & P. 607, S.C. sub. nom. *Sleath* v. *Wilson*, 2 M & Rob. 181, where a servant who had been sent to put up his master's horses at certain stables, made a detour for the purpose of

position thus taken is that the quality of the deviation is "always

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delivering a parcel of his own, and, while making that detour, drove over the plaintiff. Erskine, J., thus directed the jury: "It is quite clear, that, if a servant, without his master's knowledge, takes his master's carriage out of the coach-house, and with it commits an injury, the master is not answerable; and on this ground, that the master has not intrusted the servant with the carriage. But, whenever the master has intrusted the servant with the control of the carriage, it is no answer that the servant acted improperly in the management of it. If it were, it might be contended, that, if the master directs his servant to drive slowly, and servant disobeys his orders, and drives fast, and through his negligence occasions injury, the master will not be liable. But that is not the law; the master in such a case will be liable; and the ground is, that he has put it in the servant's power to mismanage the carriage, by intrusting him with it. And in this case I am of opinion that the servant was acting in the course of his employment, and till he had deposited the carriage in the Red Lion stables, in Castle Street, Leicester Square, the defendant was liable for any injury which might be committed through his negligence." (As reported in 9 C. & P. 607.)

This statement of the law has approved in the following cases, among others; *Mitchell* v. *Crasweller* (1853) 13 C.B. 237; *Phil. & Read. R.R. Co.* v. *Derby* (1852) 14 How. U.S. 486; *Quinn* v. *Power* (1882) 87 N.Y. 535. But in *Storey* v. *Ashton* (1869) L.R. 4 Q.B. 476, (note 1, supra) the judges declined to adopt the unqualified proposition of Erskine, J., that, "whenever the servant has entrusted the servant with the control of the carriage, it is no answer that the servant acted improperly in the management of it." It was considered that this proposition held good only in respect of acts done in the course of the servant's employment. This criticism was clearly well founded. But, with all deference, it may be suggested that the circumstance of the learned judge's having wrongly explained the rationale of a master's liability for the negligence of a driver, does not entirely nullify the value of his ruling as a precedent. The essence of that ruling was simply, that the driver was to be regarded as being engaged in the appointed duty until the horses should have been lodged in the stables, and that his master could not escape liability on the mere ground of his having not having performed that duty in the manner prescribed. This is one possible view regarding the legal effect of such circumstances as those under consideration, and its adoption does not necessarily involve, or depend upon the acceptance of the erroneous notion which was disapproved.

In *Whatman* v. *Pearson* (1868) 37 L.J.C.P. 156, L.R. 3 C.P. 422, 18 L.T.N.S. 290, 16 Week. Rep. 649, the defendant, a contractor under a district board, was engaged in constructing a sewer, and employed men with horses and carts. The men so employed were allowed an hour for dinner, but were not permitted to go home to dine or leave their horses and carts. One of the men went home about a quarter of a mile out of the direct line

of his work to his dinner, and left his horse unattended in the street before his door. The horse ran away and damaged certain railings belonging to the plaintiff. *Held*, that it was properly left to the jury to say whether the driver was acting within the scope of his employment, and that they were justified in finding that he was. Bovill, C.J., said: "In the present case, the servant had charge of the horse and cart, and it was through his negligence and want of care, whilst acting in the course of his employment, that the accident occurred. The jury were quite at liberty to come to the conclusion they did; and I cannot doubt its accuracy." Byles, J., said: "When the defendant's servant left the horse at his own door without any person in charge of it, he was clearly acting within the general scope of his authority to conduct the horse and cart during the day." Keating, J., said: "Mr. Chambers's contention in substance is that there was such an amount of deviation by the defendant's servant from the line of his duty, that he ceased to be acting in the course of the employment of his master. It is always, however, a question of degree."

In *Williams* v. *Koehler* (1899) 41 App. Div. 426, 58 N.Y. Supp. 863, it appeared that the driver of one of defendant's trucks, when returning to the brewery with a load of empty kegs, deviated a couple of blocks from his direct route in order to visit a friend; that in his absence, the horses, which he had left unattended in the street, started, but after going a few yards were stopped by a stranger, who, in attempting to drive them back to the place where the driver had left them, drove the truck against a push cart, standing in the street, and overturned it, precipitating the plaintiff, who was standing on the sidewalk, against a coal box. *Held*, that the driver's deviation from the direct route to the brewery did not relieve the defendant from liability for his negligence in leaving the horses unattended in the street. The court said: "The duty of the driver's employment required him to drive the truck back to the brewery. Though he deviated from his direct road, still the conduct and management of the team on the course he took were none the less services in the course of his employment. At most his acts constituted misconduct in his employment, not an abandonment of it. The case is not at all similar to one where the servant takes his master's team for a purpose unauthorized and solely his own. In such a case the driver would not be acting in the service of his master. But here the driver did not take the truck as a vehicle or means of transporting himself the two blocks he went out of his way, but intending to go to see his friend and at the same time intending to return the truck to the brewery, as was his duty, he drove the truck over the route adopted for the very purpose of continuing his service, in taking charge of the team and truck, and not for his own purposes."

In *Lovejoy* v. *Campbell* (1902) 16 S.D. 231, 92 N.W. 24, a servant, employed to drive a water tank for a threshing machine, deviated, at the request of a fellow servant from his usual course to obtain oil to be used on the threshing machine. One of his horses, while standing near a tree

gnawed it so that it died. *Held*, that the deviation was not such as would authorize the court to determine as a matter of law, that the servant was not engaged in his master's business at the time when the injury was inflicted. The court said: "Evidently Suhling was not acting in obedience to the express orders and directions of his employer when he left the latter's team standing in front of the plaintiff's residence to get oil sent for by a person, who is not shewn to have been authorized by Campbell to send for it on his behalf. But was he not then in the execution of his master's business, within the scope of his employment? Whether the act of a servant for which it is sought in a particular case to hold the master responsible, was done in the execution of the master's business within the scope of the employment, or not, must, from the nature of things, in most cases, be a question of fact for the jury. Where, as in the present case, the question of the master's responsibility turns principally upon the extent of the servant's deviation from the strict course of his employment or duty, it has generally been held to be one of fact, and not of law."

In *Riordan* v. *Gas Consumers' Ass'n.* (1907) 4 Cal. App. 639, 88 Pac. 809, a corporation hired a horse and buggy from a livery stable for the use of its superintendent about the city in the discharge of his duties. The superintendent's regular hours of employment did not include one hour after 12 o'clock each day, and this hour was at his own disposal. He was told by the livery stable keeper that the horse might run away unless hitched when standing. The superintendent drove to his home in order to take lunch, and, while the horse was there, between 12 and 1 o'clock, it ran away, as the superintendent was about to feed him, owing to his negligence in failing to hitch it. *Held*, that the corporation was liable for injuries caused to a person in the street from the runaway. The court said: "The defendant took the exclusive charge of the horse from the time it left the stable until it was returned at night. The stable keepers had intrusted the defendant with its care and safekeeping. They had instructed defendant's servants to be careful with the horse, and not to take the bridle off when feeding it. It was, therefore, the duty of defendant to take such care of the horse as a reasonably prudent person would do under similar circumstances. It being the duty of defendant to care for the horse, that duty could only be performed by some person in defendant's employ. It was the duty of defendant to take care of the horse, during the noon hour. Fagan could have delegated this duty to any one in the employ of defendant, or perhaps he could have left the horse in the stable during the noon hour, but he did not do either, but took charge of the horse himself. He, being the superintendent of defendant, took upon himself the care of the horse during the noon hour. If he had employed Arnold, or any other person, to take charge of the horse during such hour, and the negligent act had been done by such person, the defendant would be responsible. It is none the less so because done by the superintendent. It was the duty of Fagan, in the line of this employment, to care for the horse and feed it. He was the superintendent

of defendant during the noon hour as well as during business hours. He could not depart from his employment. He had not gone off on an independent mission of his own, but in feeding the horse was in the performance of a duty in the line of his employment. To hold otherwise would be to hold that, if the acts had occurred in precisely the same manner they did a minute before 12 o'clock, or a minute after 1 o'clock, the defendant would be liable, but would not be liable between 12 o'clock m. and 1 o'clock p.m."

In *Chicago Consol. Bottling Co.* v. *McGinnis* (1899) 86 Ill. App. 38, a verdict for the plaintiff was sustained, where a servant who had driven a few blocks out of his proper route to see his wife injured a boy just as he was starting again from the house to resume his duties. On the first appeal (1893) 51 Ill. App. 325, the court argued thus: "The act of so leaving it (i.e., the wagon) was performed while the wagon was diverted from the business of the appellant, and used to promote the pleasure of the driver. If we assume that, notwithstanding his departure from his route, injuries inflicted by him while driving, resulting from his manner of driving, would have charged the appellant, as being within the scope of the employment of the driver or his discretion as to route, no such assumption can be made as to the act of abandoning temporarily the service of the appellant and leaving the property of the appellant without care." The distinction thus taken between injuries caused by the manner of driving and those which result from leaving a team unattended is not countenanced by any other case, so far as the writer is aware, and seems to be quite illogical. It is also impliedly discredited by some of the decisions above cited.

In *Weber* v. *Lockman* (Neb. 1903) 60 L.R.A. 313, 92 N.W. 591, a servant, on horseback, drove the cattle of his master to a pasture, and, instead of returning at once, waited until nightfall, and paid a visit to some friends. While he was returning home, his horse ran away and ran over plaintiff. *Held*, that the master might properly be found liable for the resulting injuries. The court said: "The boy was a minor, riding his father's horse. It was his duty, after having executed his mission, to return the animal to his father's stables. Whatever negligence there was in departing from the direct route, or in delaying his return until after nightfall, or in the management of the horse at the time of the accident, was committed in the performance of this duty and service. And, besides, it does not appear that his departure from the direct route was in itself negligent, or that his visit to the young people in any way contributed to an accident which did not occur until after the visits had ended and he had resumed his homeward journey, and thus returned to the strict line of his employment. If the fact of delay until after nightfall contributed to the mishap, it was that mere fact, and not the occasion for it, which did so. If it was negligent for the boy to ride after dark, it is immaterial what induced him to incur the risk."

In *Rahn* v. *Singer Mfg. Co.* (1885) 26 Fed. 912 (affirmed (1889) 132 U.S. 518, but the only point discussed was whether the tortfeasor was

a question of degree."[3] In cases where the deviation is slight and not unusual, the court may and often will, as matter of law, determine that the servant was still executing his master's business.[4] So, too, where the deviation is very marked and unusual, the court in like manner may determine that the servant was not on the master's business at all, but on his own. Cases falling between these extremes will be regarded as involving merely a question of fact, to be left to the jury or other trier of such questions."[5] The essential matter to be determined is whether the servant's departure from his master's instructions is to be taken as indicating merely disobedient or unfaithful conduct in

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a servant), it was left to the jury to say whether the servant was acting in the scope of his employment, but the precise facts involved are not shewn by the report.

[3]Keating, J., in *Whatman* v. *Pearson*, note 2, supra.

[4]Theoretically this statement may be correct; but the writer has not found any decision which can with certainty be said to sustain it. The lack of direct authority is readily accounted for by the fact that all the judicial declarations which have been made regarding the right of plaintiffs to recover have been merely expressions of opinion as to the propriety of verdicts under the given circumstances. In *Sleath* v. *Wilson*, note 2, supra, Erskine, J., may possibly have intended it to affirm the right of action, as a matter of law. But in considering the effect of his ruling it is advisable to bear in mind the warning of the Privy Council, that "summaries composed by the reporters of trials at Nisi Prius may not always convey the exact ruling of the presiding judge. It is difficult also to determine whether the words quoted in the reports represent words of advice on absolute direction." *Clouston* v. *Corry* (1906) A.C. 122.

[5]*Ritchie* v. *Waller* (1893) 63 Conn. 155, 27 L.R.A. 161, 38 Am. St. Rep. 361, 28 Atl. 29. See § 8, note 1, *post*. The court did not attempt to furnish any examples of deviations which fall within the contrasted categories adverted to as presenting situations in which a court may determine the question of liability as a matter of law. Nor apparently has the meaning of those words been illustrated by any decision rendered with reference to the doctrine now under discussion. The cases cited in note 1, *supra*, are clearly of no significance for this purpose, if their true rationale has been correctly explained by the author.

respect of the master's affairs, or a total abandonment of those affairs.[6]

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[6]In *Loomis* v. *Hollister* (1903) 75 Con., 718, 55 Atl. 561, the servant was employed to deliver ice over a specific and defined route covering several miles, and drive back to the stables. While returning to the stables, he drove out of the prescribed route to the extent of about half a mile to get his letters at the post office. The team being left unfastened and unattended while he was in the office, started for the stables, and ran against the wagon of plaintiff, injuring her. *Held*, that the trial judge had correctly instructed the jury that for all acts done by a servant in the execution of his master's business within the scope of the employment, and for acts warranted by the authority conferred on him, the master was liable, while for other acts the servant alone was responsible; that a mere departure by the servant from the strict course of duty, though for a purpose of his own, was not of itself such a departure from the master's business as to relieve him from liability, but that where there was a total departure, so that the servant might be said to be on a frolic of his own, the master would not be liable, and that the jury, in determining whether there was such a deviation as would relieve defendant, should consider all the circumstances of the case.. The court rejected the contention of counsel that the part of the instruction referring to a "frolic" was erroneous, as leading the jury to believe that the judge meant that no deviation on business of the servant could become a total departure unless that business was of a hilarious nature. The following remarks were made: "Where a servant's employment includes the daily or occasional driving, use and management of his master's horses and wagon for the purposes of that employment, and the servant, while thus employed, is guilty of negligence in the management of the team, whether by reason of reckless driving or of recklessly leaving the horses unhitched and unattended, that negligence is done in the execution of his master's business, within the scope of his employment; and this is true although the master may have forbidden such negligent acts, and although the immediate occasion of the negligence is the accomplishment of some purpose purely personal to the servant, as the overtaking of some one he wishes to speak with on his own business, or stopping to enter a house on an errand of his own, or disobedience of orders as to the precise route he shall follow; that is to say; the servant may be engaged in the execution of his master's business within the scope of his employment, although, in conducting that business, he is negligent, disobedient and unfaithful. On the other hand, if the servant takes his master's team without authority and goes off on an errand of his own, he is not engaged in his master's business and the master is not liable for his negligence. Likewise, when the servant has taken his master's team in pursuance of his employment and, abandoning the purpose for which he started, goes off on some business of his own, he may

7. Same subject. General remarks as to the conflict of doctrine.— If the effect of the two groups of cases reviewed in the preceding section, and the footing upon which they were decided, have been correctly explained by the writer, it is obvious that they must be regarded as reflecting an essential difference of opinion, not only with respect to the absolute evidential significance of the element of a deviation for a purpose disconnected from the servant's duties, but also with respect to the appropriate provinces of courts and juries in determining the import of that element.

The rationale of one group seems to be, broadly speaking, the conception that it should be presumed, not in point of law, but as a matter of fact, that from the moment when a servant has, for the purpose of accomplishing an extraneous purpose, begun to make a deviation along a route upon which he has no duties to discharge, he ceases to be in the employment of his master even in respect of the function of managing the vehicle or horse intrusted to him. The effect of this conception is that whatever acts the servant may do in respect of that function, after the deviation has been commenced, are so far as regards the master's liability, placed upon the same footing as acts of a like description, when performed in the course of a journey undertaken ab initio for the accomplishment of objects which have no connection with his ordinary work. See § 10, *post*. In fact the notion explicitly relied upon in the English cases in which the right of recovery was denied was that the deviations were of such a character that they constituted "separate" or "independent" journeys.[1]

With regard to the decisions in the other group it would appear that they must in the final analysis be explained upon the

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thus take his master's team into his own possession without authority, for the transaction of his own business, and in such case his acts are not in the execution of his master's business and his master is not liable for his negligence." The court observed that these propositions might be regarded as statements of law. See also the language of Erskine, J., in *Sleath* v. *Wilson*, note 2, supra.

[1]See preceding section, note 1.

theory that, except in those instances where the evidence is clearly indicative of a different conclusion, a jury is warranted in inferring that, in spite of the deviation, the servant's duty in regard to such management still subsisted and continued to be performed on the master's behalf. Under this theory it is assumed to be ordinarily a possible inference from the circumstances, that the servant was performing his contractual functions concurrently with extraneous acts, and the master's liability is regarded as being predicable on the same ground as in cases where a journey is professedly undertaken ab initio, partly in the interest of the master, and partly for purposes which do not concern his business. See § 11, *post*. This notion of the simultaneous pursuit of two objects emerges distinctly in the language used in some of the cases.[2] Logically that notion would seem to be unexceptionable, and if it were accepted as the criterion of the right of recovery in every instance, the somewhat unsatisfactory consequences which may often result from treating the master's liability as a question determinable, not with reference to the essential quality of the servant's act, but with reference to the locality where it was done would be largely obviated.

Having regard to the facts presented in the English cases,

[2]In *Gracey* v. *Belfast Tr. Co.* (1901) 2 Ir. Rep. 322, Palles, C.B., expressed the opinion that the apparently conflicting decisions in *Whatman* v. *Pearson*, and *Storey* v. *Ashton* (see preceding section), were to be distinguished on the ground that, in the former case, the master's business had not been completed, as it had been in the latter. Accordingly in the one case the performance of the servant's duties continued in spite of the deviation, while in the other the servant was using the vehicle solely for his own purposes. The manifest objection to the explanation, as applied to the *facts* in *Storey* v. *Ashton*, is that, while the servant was returning to his master's premises with certain articles which it was his duty to bring back. His work, therefore, was *not* completed. But the comment of the learned judge is pertinent in the present connection.

For other cases in which the continuity of the servant's duty in respect of the management of the vehicle entrusted to him is also clearly adverted to, see *Williams* v. *Koehler* (1899) 41 App. Div. 426, 58 N.Y. Supp. 863; *Chicago Consol. Bottling Co.* v. *McGinnis* (1899) 86 Ill. App. 38.

they apparently cannot be reconciled upon any other footing than that of predicating a distinction between a deviation made while the work appointed to be performed by means of the vehicle is still in progress, and a journey undertaken after that work has been completed, but before the vehicle has been restored to the repository where it is kept when not in use.[8] In order to support such a distinction is must also be assumed that there is an essential difference between work done by means of a vehicle and work done with relation to the instrumentality itself. But this hypothesis would seem to be in the highest degree forced and arbitrary. The American decisions cannot be harmonized even upon this basis.

8. Deviation as an element in cases where the servant is not required to follow a definite route.—Where a servant is ordered to go with a vehicle or riding-horse to a certain place, and, after having performed the work appointed for him at that place, to return to his master's premises, the understanding is that he is to go and return by the most direct route. If he diverges from that route, the question whether his master shall be held responsible for his negligence during the journey is determinable upon the same footing as in the class of cases discussed in the preceding section.[1]

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[8]The importance ascribed by some English judges to this distinction is indicated by the circumstance that, in *Heath* v. *London & N.W.R. Co.*, note 1, supra, it was plainly intimated by A. L. Smith, L.J., that the defendants' non-liability could not properly have been determined as a matter of law if it had been satisfactorily shown that the work assigned to the servant would not have been fully performed, until he should have made a trip to the market specified.

[1]In *Ritchie* v. *Waller* (1893) 63 Conn. 155, 27 L.R.A. 161, 38 Am. St. Rep. 361, 28 Atl. 29 (verdict for plaintiff sustained), the fact that a servant sent by the master with the latter's team and wagon to a certain place to procure a load of manure had deviated from the most direct course home for the purpose of seeing about the repair of his own shoes was held not of itself sufficient to shew that he had so far departed from the execution of the master's business as to relieve the master from liability for his negligent management of the team. One of the findings was that the servant drove around to the shoemaker's shop and there

An essentially different situation is presented where the occupation of the servant is of such a character that he may reasonably be assumed to be invested with a more or less complete discretion with regard to the lines which he shall follow while he is engaged in the discharge of his duties. Under such circumstances it would seem to be a proper, if not necessary deduction that a deviation can never, in any proper sense of the word,

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left his team and went into the shop, and that "his purpose and object in so doing was to see the shoemaker about soling or mending his shoes." The court observed that the question whether the phrase "in so doing" referred to the entire conduct of the servant from the time he left the brewery till the horses ran away, or only to his act in leaving them and going into the shoemaker's shop, was not free from doubt; but it was assumed, in accordance with the claim of the defendant, that this phrase referred to the entire conduct. Another finding was that the servant "was in the service of the defendant at the time of the accident." The court remarked that this might mean simply that at the time of the accident his term of service had not expired, and that he had not been discharged, or it might mean that in making the detour he was, and continued to be, in the execution of the master's business, within the scope of his employment. For the purpose of the discussion it was assumed that the former meaning was the correct one. Having settled these preliminary points, and formulated the rule stated in the text respecting the circumstances under which the liability of a master may be a question for the court or the jury, the court proceeded thus: "In cases of deviation the authorities are clearly to the effect that a mere departure by the servant from the strict course of his duty, even for a purpose of his own, will not, in and of itself, be such a departure from the master's business to relieve him of responsibility." . . . "In making the detour Blackwell was still in charge of his master's team, though on a roundabout way home, carting manure to his master's farm. That was his main purpose and object throughout the entire transaction. In the language of the case last cited [*Quinn* v. *Power*, 87 N.Y. 535], even if the motive was some purpose of his own, he was still about his usual employment, although pursuing it in a way and manner to subserve such purpose also. Applying these principles to the case at bar, the question for the court below was whether or not Blackwell, for the time being, totally departed from the master's business and set out upon a separate journey and business of his own. If the rule of law were that any deviation by the servant 'to carry some business of his own into effect,' was of itself such a departure the above question would be one of law. But this, as we have seen, is not the rule of law. To decide the question in a case like the present, the trier must take into account, not only the mere fact of deviation, but its extent and nature relatively to time and place and cir-

be predicable in respect of his presence at any particular point within the area covered by his contract, and that the only ground upon which the master can escape liability for his negligence is that the tortious act in question had no relation to his employment. With this conception the few cases which bear upon the subject are quite consistent, but they do not lay down any general rule in the terms suggested,[2]

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cumstances, and all the other detailed facts which form a part of and truly characterize the deviation, including often the real intent and purpose of the servant in making it. Without spending more time upon this point, we think the above question is one of fact in the ordinary sense, and that the case at bar clearly falls within the class of cases where such question is strictly one of fact to be decided by the trier. As such we think the court below decided it. . . . If, however, we should hold the question raised upon this point to be one of law, we have no hesitation in saying that the court below reached the correct conclusion on the facts found. In either point of view then there is no error."

In *Krzikowsky* v. *Sperring* (1903) 107 Ill. App. 493, where a servant was sent to purchase and bring home material for the master's business, and was given no specific directions as to route, the fact that he deviates one block from the direct route in returning was held not to constitute such a "turning away from the master's service" as would absolve the master from liability. The court said: "It is not shewn what was the ordinary route, if, in fact, there was an ordinary route, for appellant's driver. For anything that appears, Randolph street may have been as expeditious and satisfactory a route as Lake street. The character or desirability of the street is not determined by the purpose or intention of appellant's son. The proof shews that the son was in the employment of his father, and that he had been to purchase material for his father, and was, pursuant to his father's order, driving his father's horse and wagon, so that at the time of the accident he was in fact in his employment and had not yet carried out the intention, which he says he entertained, of departing from the work of his employment, and in fact did subsequently go directly from the place of the accident to his father's shop."

[2]In *Venables* v. *Smith* (1877) L.R. 2 Q.B. Div. 279, 46 L.J.Q.B. 470, 36 L.T.N.S. 509, 25 Week. Rep. 584, the arrangement between the proprietor and the driver of a cab was that the horse and cab were intrusted by the former to the latter for the day, to be used entirely at the driver's discretion during the day, for the purpose of plying for hire. The driver was to pay 16s. for the cab; all that he made above that sum was his perquisite for his labour, and any deficiency he had to make good afterwards. There was no particular time fixed for going out or returning with the cab. On the day when the plaintiff was run over by the cab

9. Liability as to acts done by the servant after having accomplished the extraneous purpose of his deviation.—There is adequate authority for the proposition that any acts of negligence of which a servant

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the driver was on his way back with the cab to the stables of the proprietor, intending to return the cab. When he came to the end of the mews in which the stables were, he went on with the cab to a tobacconist's a little way off and purchased some snuff, and on his way back to the stables the accident happened. A verdict against the proprietor was sustained. Cockburn, C.J., said: "It is contended that the liability of the master only exists with respect to acts done by the driver within the scope of his employment, and that the driver here was not acting within the scope of his employment. To determine whether the driver was so acting or not it is necessary to consider what the terms were upon which the cab was intrusted to the driver. If the employment of the cab by the driver at the time when the mischief was done was wrongful, in the sense that it was beyond the scope of the bailment, then the master would not be responsible; because it is with regard to the employment of the cab within the scope of such bailment that the relation of master and servant is created by the statutes for the protection of the public. But it appears that the cab was intrusted to the driver to use entirely at his discretion, provided that he used it properly and returned it to the proprietor's stables when the day's work was over, paying the sum agreed upon between them for the hire of it. I cannot see that the driver did anything wrongful, or contrary to the terms of the bailment as between himself and the proprietor, in using the vehicle for the purpose of going to the tobacconist to get snuff." Mellor, J., said: "With regard to the question whether the driver was acting within the scope of his employment, it seems to me that by the terms of the arrangement between the proprietor and the driver the fullest discretion was vested in the latter as to how he should earn money. He was to return the cab when he had done with it, but he was not bound to return at any particular moment, or to take any particular route. We must look at the matter from a reasonable point of view. If the driver were to take the cab on an independent journey, altogether out of the scope of the purposes for which it was intrusted to him, no doubt the proprietor could not be rendered responsible for acts done by him in the course of such journey, but I do not think the driver was in this case going on any such independent journey so as to relieve the master."

In *Mulvehill* v. *Bates* (1884) 31 Minn. 364, 47 Am. Rep. 796, it was shewn that a horse and express wagon were intrusted, generally, to the servant, with authority to secure such business as he could, make his own contracts, and drive wherever it might be necessary to go, in order either to receive or deliver any articles which he might be employed to transport. Having delivered a trunk he got a load of poles for himself, and while carrying them home on the wagon negligently ran over and in-

may be guilty in managing a vehicle or horse after the personal or other extraneous affairs which constituted the object of his deviation have been disposed of, and he has begun to return to his master's premises or to the point of his departure from the prescribed route, are to be regarded as being within the scope of his employment.[1]

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jured the plaintiff's child. *Held*, that the defendant was liable. The court argued thus: "Had some one employed him to transport a load of poles, it seems to us that there would have been no doubt but that, in going for them and in conveying them to their destination he would have been acting within the scope of his employment, for that was just the kind of business he was employed to perform, as much as in transporting trunks or any other kind of property. The fact that it was his own property which he was carrying on this occasion seems to us immaterial. If he had any articles which he himself desired conveyed by an express, there was no reason why he might not transport them in his master's wagon as well as that of third parties, being liable of course, if he did so, to account to his employer for the usual price for such services, the same as if performed for some one else. He was intrusted generally, with the wagon to hunt up just such work wherever he could find it, and with authority to carry articles for whomsoever he saw fit. Whether he accounted to the master for the value of the time occupied in transporting his own property is immaterial, that being a matter entirely between themselves." Commenting upon the contention of the defendant's counsel that the case was controlled by those cases, in which it has been held, that where the driver of the master's vehicle turns wholly aside from the master's employment and engages in an independent journey, wholly foreign to his employment, and for a purpose exclusively his own, the master is not liable for his acts, the court said: "This class of cases is clearly distinguishable from the present. There the servant had specific orders as to the mode of dealing with the vehicle, and was obliged to attend to the specific errand on which he was sent and then return to his master. If, under these circumstances, he employed the vehicle on some purpose wholly independent of his orders, of course he was not within the scope of his employment, and the master is not liable. But here the wagon was intrusted genrally, to the driver, to be used entirely at his discretion. . . . In this case, if the driver had taken the wagon on an independent journey of his own, altogether out of the scope of the purposes for which it was intrusted to him, and an injury had then occurred, the defendant would probably not have been liable. But such was not the fact. The trip in which the servant was using the wagon was within the scope of the purposes for which it was intrusted to him."

[1] This doctrine was distinctly recognized by Collins, L.J., in *Hatch* v. *London & N.W.R. Co.* § 6, note 1, supra.

10. Injury inflicted in the course of a journey made exclusively for the servant's own purposes.—It is fully settled that a master can-

In *Hepenstal* v. *Merritt* (1895) 25 Can. S.C. 150, affirming 33 N.B. 91, where it was held that a teamster in starting out to finish his work after going to his home for a meal was engaged in the performance of his duties as fully as if he had returned to the employer's store and made a fresh start. The court professed to follow *Whatman* v. *Pearson*, § 6, note 2, *supra*. But there the element of a resumption of duty was not involved.

In *Geraty* v. *National Ice Co.* (1897) 16 App. Div. 174, 44 N.Y. Supp. 659, affirmed (without opinion) 160 N.Y. 658, the servants of an ice company engaged in carrying ice from one storehouse to another had deviated from the direct route, and stopped for a time to dispose of part of the ice for their own purposes, it was held that the company might properly be found liable for an injury caused by the fall of a cake of ice after they had started again to carry the ice to the storehouse. The defendant requested the judge to charge that, if the jury believed that the servants were unloading ice from the truck at the time of the accident, outside of any duty on their part to the defendant, they must find for the defendant; and also that, if they believed that for the purpose of unloading ice or making a delivery at any place other than the one appointed by the master, they went to the place of the accident, and while there so conducted themselves that the accident happened, the defendant was not responsible for such acts. The judge refused to charge in accordance with these requests, and several others, involving similar propositions. But he instructed the jury that, if this accident happened while the driver was actually handling ice and taking it out of the wagon at that particular point, the plaintiff could not recover, because there was no evidence of any negligent handling at that time. Discussing the contention of the defendant that it was entitled to a more particular charge upon this subject, the court said: "It is the rule, no doubt, that a master is not necessarily relieved from responsibility for an injury resulting from the negligence of his servant simply because the servant is at the time acting in disobedience to the master's order. The question in every case is whether the act he was doing was one in prosecution of his master's business, not whether it was done in accordance with his instructions. If the act was one which continued until the termination, would have resulted in carrying out the object for which the servant had been employed, the master would be liable for whatever negligence might take place during its performance, although the servant in doing it was not obeying the instructions of the master, or, although he had deviated from the route prescribed by the master for the purpose of doing some act of his own, but yet with the intention at the same time of pursuing his master's business. (*Quinn* v. *Power*, 87 N.Y. 535.) The rule, as laid down by the latest cases in the English courts, is that a master is responsible for an injury resulting from the negligence of his servant while driving his

not be held responsible for an injury resulting from his servant's negligence in the course of a distinct and separate jour-

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cart, provided the servant is at the time engaged in his master's business, even though the accident happens in a place to which his master's business did not call him. But if the journey upon which the servant starts be wholly for his own purposes and without the knowledge and consent of the master, the latter will not be liable. . . . In this particular case, so long as Sweeney and McQuade were engaged in taking this ice to the Grand Central Station, they were engaged in the prosecution of the master's business, and it was liable for their acts. The liability ceased if at all, only when they were not engaged in taking the ice to the place where they were directed to take it. According to the evidence of the defendants' witness they stopped near the corner of Forty-third street and Third avenue for the purpose of unloading some of this ice. Up to that time they had been proceeding in the business in which they were engaged. While they stood there unloading the ice, if they did do so, they were undoubtedly not engaged in the master's business and were acting in their own behalf, and at that time it is quite clear that the master was not liable for the unloading in which they were engaged. The jury were so instructed by the court. They were told that if the accident happened while these men were unloading the ice the defendant was not responsible. It is true that the reason given by the court was not the one insisted upon by the defendant, but that was a matter of no importance. The material fact was that, if the jury found that the accident was caused by unloading the ice, that was the end of the liability so far as the defendant was concerned, and if the defendant had the benefit of that instruction, it had no right to complain with regard to the reasons which were given for it. But the request for a charge on the part of the defendant went further than that. It was that, if the accident happened at that place, the defendant was not responsible, without regard to the question whether Sweeney was unloading ice or not. This request, we think, went too far. There could have been but two ways, under the testimony, in which this accident occurred. One was by the slipping of the ice from the tongs while it was unloading, and the other was because it slipped off of the wagon after Sweeney had started on his way to the Grand Central Station. The defendant was sufficiently protected by the charge, if the jury found that the accident was caused in the way first mentioned. We think that the defendant was not entitled to be relieved from liability if the accident happened after Sweeney had taken his place upon the wagon and resumed his course toward the Grand Central Station, and the accident was caused by the slipping of the ice off from the wagon. At that time Sweeney, whatever may have been his object in deviating from the direct route, was again proceeding to deliver the ice. He had accomplished whatever purpose he intended to accomplish by the deviation, and had resumed the execution of the work which the defendant

ney, undertaken, without the master's authority, for the amusement of the servant himself, or for the purpose of transacting some business in which only the servant himself, or a fellow-servant, or a third person, was concerned.[1] Liability cannot be

had intrusted him to do. The essential conditions at that time were the same as they would have been had he gone on the direct route. At the time when Sweeney resumed his journey, at the corner of Third avenue and Forty-third street, the load was in the same defective condition as it was when he started, and there was the same reason to anticipate that an accident would happen as there was when he left the yard in the first place. No act of Sweeney's occurring during the deviation had operated in the slightest degree to increase the danger of harm from the negligent loading, and, therefore, when he again assumed to go on his master's business after the deviation, there had been no increase of danger arising from his negligent act by reason of which the probability of accident had been enhanced. The original defect, and that alone, was then, as before, the thing to be feared, and for all practical purposes the same conditions existed that existed when Sweeney had started from the yard. The ice was defectively loaded, and he was proceeding with it to the place where it was to be unloaded. If there had been a suspension of liability, that suspension had come to an end because he had assumed again the prosecution of his master's business."

In *Patterson* v. *Kates* (1907) 152 Fed. 481, the negligent act for which the master was held liable was done while the servant was returning to the place from which he has diverged; but this element was not specifically adverted to, and the decision was rendered independently of it.

In *Sleath* v. *Wilson* (1839) 9 C. & P. 607, the injury for which the master was held liable was inflicted after the purpose of the deviation had been accomplished. But this aspect of the evidence was not referred to by Erskine, J., in his summing up. See § 6, note 2, ante.

In *Weber* v. *Lockman* (Neb.: 1903) 60 L.R.A. 313, 92 N.W. 591, the circumstance that the injury was inflicted after the servant had finished attending to his personal affairs, and was on his way back to his master's premises, was adverted to. But the court obviously considered the action to be maintainable irrespective of this factor. See § 6, note 2.

[1]The direction of Parke, B., to the jury in *Joel* v. *Morrison*, was as follows: "If you think the servants lent the cart to a person who was driving without the defendant's knowledge, he will not be responsible. Or, if you think that the young man who was driving took the cart surreptitously, and was not at the time employed on his master's business, the defendant will not be liable. The master is only liable where the servant is acting in the course of his employment. If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable."

imputed to the master on the ground that, while such a journey

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In *Fiske* v. *Enders* (1900) 73 Conn. 338, 47 Atl. 681, the defendant was held not to be liable for the negligence of her coachman in running down the plaintiff while he was driving her horses into an adjoining city, solely for his own pleasure, and not for exercise, which they did not then need; the evidence being that he had general instructions to exercise them only when it should be necessary, and, when exercising them, to drive them only in the country, and that he had no authority to use them for his own pleasure.

In *Bard* v. *Yohn* (1856) 26 Pa. St. 482, a horse which the son of the defendant, who was also his servant, had without, so far as appeared, the defendant's consent, borrowed to take himself and some other persons to a fair in an adjoining village was hitched by too long a chain, and springing back kicked the plaintiff. *Held*, that the defendant was not liable. That a farmer was held not to be liable for the negligence of his servant in the care of a horse which he had borrowed to take himself and some other persons to a fair in an adjoining village.

In *Maddox* v. *Brown* (1880) 71 Me. 432, 36 Am. Rep. 336, the defendant's wagon and horses were taken, without his knowledge or assent, by a son who was in his employ as a servant and driven to a neighbouring village, for the purpose of depositing money received by him as treasurer of a Sunday school, and left the team unfastened in the street. *Held*, that the father was not liable for injuries caused by the horses running away.

In *Way* v. *Powers* (1894) 57 Vt. 135, the jury found that the defendant, J. P., was the owner of two horses, and the defendant, A. P., his son and hired man, drove them as often as he had occasion for private driving, without special permission of his father. On the day in question A. P., who was expecting a friend to make him a visit at his father's home, took one of said horses and a wagon, without the permission of his father, and drove them to the depot at W. to meet his friend. His father did not know he had gone until he had been absent some time; but expected and was willing he should take the team to bring his friend from the depot, when he should need it for that purpose. A. P., after arriving at the depot fastened his horse, which finally broke and ran into the team of the plaintiff. *Held*, that no recovery could be had against the father, for the reason that A. P. was not in his employment, nor acting upon his business at the time of the accident. No license to take the horse could be inferred from the fact that he had used him upon his own business upon previous occasions without leave.

In *Fish* v. *Coolidge*, (1900) 47 App. Div. 159, 62 N.Y. Supp. 238, where the plaintiff was struck and injured, owing to the negligence of a teamster employed by defendant, the evidence shewed that, at the time of the accident, the teamster was driving solely for his own pleasure; and defendant testified that the driver had no authority to exercise the horse on Sunday. *Held*, that there was not sufficient evidence to go to the jury

was in progress, the servant performed some acts of a descrip-

on the question whether the driver was at the time of the accident acting within the scope of his employment, and a nonsuit was warranted.

In *Thorp* v. *Minor* (1891) 109 N.C. 152, 13 S.E. 702, the owner of a horse, having rented a warehouse to a certain firm, left the horse with them and used the horse in common with them. A clerk of the firm obtained the horse from the firm without the knowledge of the owner, to drive to a picnic, the firm telling him to send the horse back if he had opportunity. This he did through a boy not in the employ of the firm or the owner of the horse. The boy left the horse standing in the street, and it ran away, and killed plaintiff's horse. Held, that the firm were not liable, because the boy was not in their employ, and the clerk, in respect of the use of the horse, was not acting in the scope of his employment. The court said: "The mere request to the clerk to send the horse back would not have made the firm responsible for the pay of the person who brought the horse back if he charged for such service, and, of course, would not, therefore have made them responsible for his negligence. Whether the clerk borrowed or hired the horse, it was an implied part of the hiring or borrowing that he should return the horse and, if he chose to send him back by another, such other, was his servant, and not the servant of the firm. If the clerk had driven the horse back himself, the firm would not have been responsible for his negligence, nor can they be made liable because he chose to send him back by a substitute."

In *Evans* v. *A. L. Dyke Automobile Supply Co.* (1907) 121 Mo. App. 266, 101 S.W. 1132, plaintiff, who was the owner of an automobile which he desired to sell, was about to deliver it to defendant for sale on commission, when defendant's servant L., directed plaintiff's servant to retain the machine until the succeeding day, which was Sunday, in order that L., might shew it to a prospective buyer; defendant's garage being closed on Sunday. This was agreed to, and on Sunday L. took the machine and, while using it on a pleasure trip of his own, it was struck by an electric car and destroyed. *Held*, that L., while so using the machine, was not acting in the course of defendant's business, and that the latter was therefore not responsible for the loss of the machine.

In *Stewart* v. *Baruch* (1905), 103 App. Div. 577, 93 N.Y. Supp. 161, where the plaintiff had been run down by defendant's automobile, which his chauffeur had taken in violation of orders to certain races, the doctrine laid down with a view to a new trial was that a chauffeur is not acting within the scope of his employment, when, in violation of the instructions of his employer, he takes out the employer's automobile for his own pleasure. The same doctrine was also applied in *Sarver* v. *Mitchell* (1907) 35 Pa. Super. Ct. 69.

That defendant was not liable for injuries resulting from the negligent driving of his motor car by his minor son, where the son at the time was engaged in delivering presents on his own account, and had taken the car out without defendant's knowledge or consent, was held in *Maher* v.

tion similar to those which he might have had occasion to per-

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Benedict (1908) 108 N.Y.S. 228, 123 App. Div. 579. The court said: "Liability cannot be cast upon the defendant because he owned the car, or because he permitted his son to drive the car whenever he wished to do so, or because the driver was his son."

In *Slater* v. *Advance Thresher Co.*, 107 N.W. 133, 97 Minn. 305, 5 L.R.A.N.S. 598, defendant was a Michigan corporation engaged in the manufacture and sale of farm implements. Gregory was its general manager for the Northwest, with headquarters at Minneapolis, this state, and Nichols was its general agent for the state of North Dakota, and resided at Fargo, in that state. Defendant furnished its agent at Fargo an automobile to facilitate in the performance of the duties of his agency, which he used whenever necessary. After business hours on the day of the injury complained of in this action, the two agents, Gregory and Nichols, took the automobile so furnished Nichols by the defendant, and started for Moorehead, in Minnesota, across the river from Fargo, on a mission purely personal to themselves and wholly independent from the affairs and business of defendant. While so engaged a team of horses belonging to plaintiff became frightened by the manner in which the agents operated the automobile, ran away, injuring the plaintiffs and damaging his buggy. *Held*, that the defendant was not liable, the case being governed by the rule that "the master is not liable for injuries occasioned to a third person by the negligence of his servant while the latter is engaged in some act beyond the scope of his employment, for his own or the purposes of another, although he may be using the instrumentalities furnished by the master with which to perform his duties as servant." The lower court was directed to enter judgment for the defendant, *non obstante veredicto*.

In *Clark* v. *Buckmobile Co.*, 107 App. Div. 120, 94 N.Y. Supp. 771, the general manager of an automobile company took a day off from business, and went to another city on his own affairs, where at the request of a co-employee, he purchased for him some goods, which he charged to the company, as a means of paying for them. On his return he telephoned for another employee to come to the station for him with an automobile, and, on the way from the station, plaintiff was injured, owing to the negligence of the manager and the other employee in the management of the machine. A verdict for the plaintiff was set aside. The court said: "These two men were in charge of the machine when the accident occurred. Davis was running it, and Birdsall was giving more or less directions with reference to its movements. Neither of them was engaged in defendant's business, however. They did not represent the defendant, and it was not and is not liable for any negligence they were guilty of, which caused plaintiff's injuries. Suppose they had taken a day off, for pleasure and had borrowed or leased the machine from the defendant to enable them to enjoy their outing; would the defendant be liable for any injuries resulting from their negligence in operating the machine while they were out

form in the ordinary course of his employment.[2]

upon the road? Suppose after business hours, any day, they had borrowed or leased the machine from the defendant to enjoy a few hours' run across the country for their own pleasure; would the defendant be liable for any injuries caused by their negligent operating of the machine while they were out? It is quite apparent that in the cases suggested, no liability of the defendant would result. The reason is, that in order to establish liability, the persons must not only be generally employés of the defendant, but must be employed in the defendant's business, and not merely in their own recreation and pleasure, at the time the injuries are caused. This defendant is a corporation, and not an individual, and its agents cannot render it liable by merely helping themselves to its machine and using it outside its business, and purely for their own private purposes, whether of business or pleasure." The contention that the manager in charging to the company the price of the clothes' purchased by him was engaged in its business was rejected.

In *Reynolds* v. *Buck*, 127 Iowa, 601, 103 N.W. 946, the defendant was a dealer in agricultural implements, automobiles, etc., and had decorated an automobile belonging to him for use by his daughter in a parade. After the parade, defendant directed that the automobile, which stood in front of the store, be taken inside. His son, who was in his employ as a clerk, took the machine and invited a lady to take a ride with him. While the son was operating the machine for that purpose, plaintiff's horse was frightened thereby and he was injured. Held, that the defendant was not liable. The court said: "The direct evidence all shews that his use of the electric automobile was solely for the pleasure and convenience of the young lady and himself (defendant's son), and that it was in no way or sense connected with his employment or with the defendant's business." It was held that defendant was not liable.

In *Quigley* v. *Thomson* (1905) 211 Pa. 107, 60 Atl. 506, an action against the owner of an automobile, it was held that, where the chauffeur of the defendant was called as a witness by the plaintiff to shew that he was in the employ of the defendant, and to identify the car, it was competent for the defendant on cross-examination to develop by the witness the fact, which qualified his testimony, that at the time of the accident he was using the machine in the prosecution of his own business and not in the business of his employer, and that in so doing he was acting contrary to the orders of his employer.

[2] In *Raynor* v. *Mitchell* (1877) L.R. 2 C.P.D. 357, 25 Week. Rep. 633, a carman, without his master's permission, and for a purpose of his own wholly unconnected with his master's business, took out his master's horse and cart, and on his way home negligently ran against a cab and damaged it. The course of the employment of the carman was, that, with the horse and cart, he took out beer to his master's customers, who was a brewer, and in returning to the brewery he called for empty casks

It has been argued in some cases that an automobile should be regarded as an instrumentality which falls within the scope of the general doctrine by which an absolute liability in respect of injuries caused by certain abnormally dangerous things is imposed upon the parties who own or control them, irrespective

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wherever they would be likely to be collected, for which he received from his master a gratuity of 1*d.* each. At the time of the accident the carman had with him two casks which he had picked up on his return journey at a public house which his master supplied, and for which he afterwards received the customary 1*d.* Held, that the carman had not re-entered upon his ordinary duties at the time of the accident, and therefore the master was not liable. Coleridge, C.J. said: "The sole question is whether, having started out on a journey for his own purposes in the way described, did the fact that, in returning home, the servant took up some empty casks constitute a re-entering upon his ordinary duties, as the learned judge phrases it; or, in other words, did it convert the journey into a journey made in the ordinary course of his employment, so as to make his master responsible for his negligence? In substance and good sense I think it did not. I cannot, therefore, agree with the conclusion of the learned judge, that, at the time the damage complained of was done, the man was engaged in his master's employment. I think the judgment should be reversed." Lindley, J., said: "The question is whether, upon that distinct statement (i.e. by the trial judge) of the servant's employment, the master is responsible for an accident happening in the manner stated? I think he is not. Treating it either as a question purely of fact or as a mixed question of law and fact, when did the man enter upon the course of his employment? If the accident had happened whilst the servant was returning home not having collected the empties, it is plain that the defendant would not have been liable; the man clearly could not then have been said to have been in his master's employ. Does it alter the case, that, while going back, he picks up a cask or two? The inference I draw from the facts found in the case is, that the servant was engaged, as well on his return as on his outward journey, upon his own private business; and that that journey cannot by the mere fact of the man making a pretence of duty by stopping on his way be converted into a journey made in the course of his employment."

In *Lotz* v. *Hanlon* (1907) Pa., 66 Atl. 525, 10 L.R.A.N.S. 202, it was held that a verdict for the defendant had been properly directed where the only evidence adduced by the plaintiff, who had been run down by a automobile, was that the vehicle belonged to the defendant, and that, at the time of the accident, it was being driven by a man regularly employed by the defendant as a chauffeur; while on the other hand the testimony of the defendant shewed it had been taken from his garage without his permission, in pursuance of an arrangement made by the chauffeur to give some friends of his a drive. Discussing the

of whether they were, at the time when the injury was inflicted, under the charge of those parties themselves or their agents or servants.[3]

This contention, however, has been rejected.[4]

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evidential significance of the fact that the chauffeur intended to procure, during the excursion some spark plugs for use in connection with the automobile, the court said: "It is clear that this purpose was simply incidental to the evening's trip, and was suggested by consideration of the driver's own convenience. The main purpose of the drive was for the pleasure and enjoyment of the driver and his selected friends. The persons invited by him resided quite a distance from each other, and in assembling them the driver, at the start, was obliged to go a considerable distance in the opposite direction from where the supply store was. It was after all were in the machine that the accident happened, but it was while he was at a point further from the supply store than was his starting point. But had it happend while on the direct route to the store, even though the obtaining of sparks was the main purpose of the drive, this would not have made it an errand on the master's business, without some evidence that it was taken with the knowledge and approval of the master. There was not a particle of evidence in the case that the use of the machine for such purpose had ever been allowed by the master. The most that appeared was that the driver had been allowed on some occasions to purchase the necessary supplies for the machine at this store on the master's credit; but none that he had ever used the machine in going to the store to get them, or that he ever employed it in any way except as ordered by the master in connection with each particular occasion. So far as appears, the use of the machine by the driver on the evening when the accident occurred was wholly unlicensed, was for his own convenience and pleasure, and therefore entirely apart from his master's business."

In *Carl Corper B. & M. Co.* v. *Huggins* (1901) 96 Ill. App. 144, a servant engaged to solicit customers for its beer, used a conveyance of his in performing this service. On the day that plaintiff was injured, the servant had obtained a release from work until the next day. He was requested by a bookkeeper of the defendant to get beer stamps, and bring them with him the next morning. Having purchased the stamps he went to a saloon, where he remained until he became intoxicated, and on his way home ran against plaintiff. Held, that these facts are insufficient to shew that such employé, at the time of the collision, was so far engaged in defendant's employment as to make the latter liable for his negligent act.

[3] *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330, 37 L.J. Exch. 161, aff'g L.R. 1 Exch. 265.

[4] *Slater* v. *Advance Thresher Co.* (1906) 97 Minn. 305, 5 L.R. A.N.S. 598, 107, N.W. 133, followed in *Jones* v. *Hoge* (1907), 14 L.R.A.N.S. 216, 92 Pac. 433.

11. Injury inflicted on a journey undertaken partly on behalf of the master, and partly for the servant's own purposes.— Where a servant receives permission to use his master's vehicle or horse on a journey which he desires to make for his own purposes, and at the same time agrees to perform during the journey some act on behalf of the master, the responsibility of the master for the negligence of the servant in respect of the management of the vehicle or horse during the journey is ordinarily a matter to be determined by the jury upon a consideration of the whole evidence.[1]

12. Liability of a master in respect of injuries wilfully inflicted.— Under the common law procedure damages for personal injury wilfully inflicted by a servant cannot be recoverd from his master, this doctrine being the necessary consequence of two techni-

[1] In *Cormick* v. *Digby*, (1876) 9 Ir. R. C.L. 557, a herd got leave from his master to go for the day to a neighbouring town to transact business of his own, and borrowed his master's horse and tax-cart for the purpose. He afterwards proposed, and the master assented, that he should bring home some meat from the town for the master. He drove the horse and tax-cart so negligently that he injured the plaintiff. *Held*, upon the evidence, it could not be held as a matter of law, that the master was responsible for the negligence of the servant. Palles, C.B., said: "Either of two inferences can be drawn from these facts, viz. (1st), that the services of Conlan as herd were dispensed with for the day, upon the terms of his bringing the meat from Mullingar, or (2nd), that by the arrangement the scope of his employment as herd was, for this day extended, so as to include the act of carrying the meat, although his other services were not required for the day. In the one case, the obligation to bring the meat would have been independent of the service; in the other the scope of the employment would be extended so as to include the act. If the jury adopted the first view, the act in question would not have been the act of Conlan as servant of the defendant; if they arrived at the second conclusion the contrary result would follow, and the defendant would be liable. In my opinion, it was for the jury to determine, as an inference of fact, the true effect to be attributed to the new arrangement as affecting the previous employment of Conlan."

In *Haywood* v. *Hamm* (1904) 77 Conn. 158, 58 Atl. 158, testimony given by the defendant, that on the day in question his son was in charge of the horse which caused the injury, and was using it to attend to some of his business and probably some of his fathers' also, was held to be prima facie proof of his agency.

cal rules of pleading, viz., that an action in the case cannot be maintained in respect of such an injury,[1] and that an action of trespass lies only against the tortfeasor himself, or a person by whose orders or with whose assent the tort was committed.[2] This doctrine has several times been applied with reference to claims based on the misconduct of drivers.[3] In some jurisdictions it survived for a while the abolition of the old forms of action.[4] But, speaking

[1] *Savignac* v. *Roome* (1795) 6 T.R. 125.

[2] *Morley* v. *Gaisford* (1795) 2 H. Bl. 442 (master not liable in trespass for a tort not done at his command); *McManus* v. *Crickett* (1800) 1 East, 106 (master not liable for the act of a servant who wilfully drove his carriage against that of another party without his direction or assent); *McLaughlin* v. *Pryor* (1842) 4 M. & G. 48 (master liable in trespass, as the evidence shewed that the tort was done with his assent); *Triller* v. *Voght* (1851) 13 Ill. 277 (master not liable for wilful tort unless he expressly commanded it).

In *Wright* v. *Wilcox* (1838) 19 Wend. 343, the plaintiff's son, a young lad, had taken hold of the side of the defendant's wagon for the purpose of getting on to it, as the driver had been invited to do. The driver was cautioned by a by-stander that, if he did not stop his team, he would kill the boy. He paid no attention to this warning, but whipped his horses into a trot, the consequence being that the boy fell and was run over. A verdict for the plaintiff was reversed on the ground that the jury had been wrongly instructed that the defendant was answerable whether the injury was wilful or only attributable to negligence. The court laid it down categorically that "the dividing line is the wilfulness of the act." But this doctrine no longer prevails in New York. See cases cited in note 3, infra.

[3] In *Metcalf* v. *Baker* (1874) 57 N.Y. 662, the referee found that defendant's servant "violently, negligently and carelessly" drove the baker's wagon of defendant against the plaintiff's carriage, etc., "with great force and violence," throwing plaintiff upon the pavement. Defendant's counsel claimed that the finding was to the effect that the act of the servant was wilful, and therefore defendant was not liable. *Held*, that the finding did not import a wilful act, but simply negligence; that the words "with great force and violence" and "violently" were used only to express the rapidity of driving and the effect of the concussion. This case in its earlier stages is reported in *Metcalf* v. *Baker* (1871) 2 Jones & S. 10, aff'd 52 N.Y. 649 (memo.).

Having regard to the extremely narrow ground upon which the liability of the defendant was affirmed in the above case, it seems reasonable

generally, it may be said that, except in the states and countries where those forms are still preserved, the

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to infer that the court must have proceeded upon the assumption that the plaintiff could not have recovered if the act in question had been specifically found to be "wilful." That this position, however, if it was in point of fact adopted, was soon afterwards abandoned is apparent from *Cohen* v. *Dry Dock, E.B. & B. R. Co.* (1877) 69 N.Y. 170, aff'g (1876) 8 Jones & S. 368, plaintiff, while travelling in a buggy along a street in the city of New York, was stopped by a blockade of vehicles just as he had crossed defendant's track. The rear of his buggy was so near the track that a car could not pass without hitting it. A car came up, the driver of which, after waiting a moment or two, ordered plaintiff to 'get off the track.' Plaintiff was unable to move either way, and so notified the driver, who replied with an oath that he was late, and that, if plaintiff did not get off he would put him off. Immediately afterwards he drove on, striking and upsetting plaintiff's buggy, and injuring him. *Held*, that the evidence did not authorize a finding as matter of law, that the act of the driver was with a view to injure plaintiff, and that therefore a dismissal of the complaint was error. The court said: "If he acted recklessly (and that is the most that can be said here), the defendant was responsible for his acts. He was not seeking to accomplish his own ends. He was seeking to make his trip on time, and for that purpose, and not for any purpose of his own, sought to remove plaintiff's buggy from the track. It cannot be said to be clear, upon the facts proved, that the act of the driver was done with a view to injure the plaintiff, and not with a view to his master's service. He may have supposed that the plaintiff would get off from the track in time, or that he could crowd him off without injury. The evidence should at least have been submitted to the jury. They were the proper judges of the motives and purposes of the driver, and of the character and quality of his acts."

The reasoning of the court and the decision in the case last cited, is manifestly based upon the assumption that there is an essential distinction so far as the employer's liability is concerned, between wilful acts which are and which are not done in the course of the servant's employment. That distinction is reflected still more clearly in *Mott* v. *Consumers Ice Co.* (1878) 73 N.Y. 543. An action brought for injuries caused by the act of a servant in driving his master's wagon against plaintiff's carriage had been dismissed by the trial judge on the ground that, as the plaintiff's witness had testified that the servant had driven purposely, it was apparent that the injury was occasioned by a wilful and malicious act. The Court of Appeal granted a new trial, holding that the language thus used by the witness was a mere expression of opinion, and that the quality of the driver's act was a question for the jury. The following remarks were made: "The rule recognized in all the recent cases, and which does not materially conflict with any of the older deci-

right of recovery is determined with reference to the broad principle, that the wilful acts of a servant are imputable, or

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sions, although it may qualify some of the intimations and casual expressions or illustrations of the judges, is that for the acts of the servant within the general scope of his employment while engaged in his master's business and done with a view to the furtherance of that business and the master's interests, the master will be responsible whether the act be done negligently, wantonly, or even wilfully. The acts for which the master will not be liable are such as were not done in the course of the service and were not such as the servant intended and believed for the interest of the master. There are intimations in several cases of authority that for the wilful acts of the servant the master is not responsible. But these intimations are subject to the material modification that the acts designated 'wilful' are not done in the cause of the service and were not such as the servant intended and believed to be for the interest of the master. In such case the employer would not be excused from liability, by reason of the quality of the act."

In *Curley* v. *Electric Vehicle Co.* (1902) 68 App. Div. 18, 74 N.Y. Supp. 35, the cab-drivers who frequented a certain stand in New York, the line of which extended along A. street to the corner of B. street, which intersected it at right angles, and then down the latter street, were accustomed, upon their arrival, to place their cabs at the end of the line in B. street. Just as the driver of a hansom-cab belonging to the plaintiff reached the stand on the day in question, the rear cab in the line on A. street was driven away; and observing this he waited for a few moments to see whether the line would close up. At that time one of the defendant's electric cabs occupied the head of the line on B. street, a position which some of the drivers preferred. The plaintiff's driver, after waiting several minutes, saw no indication of any intention on the part of the defendant's driver to take the vacant position, and drove across the street and occupied it himself. He stopped the hansom, with the horse's head about three feet from the cab in front. Thereupon the defendant's driver mounted his cab and came around on A., and told the plaintiff's driver that that was his place and to move out or back up. The plaintiff's driver made no effort to comply with his request and held the place. The defendant's driver then cut in ahead of plaintiff's vehicle and backed into his horse, knocking or crowding the horse onto the sidewalk and inflicting substantial injuries. *Held*, that the jury would have been justified in finding that defendant's driver was acting in the course of his employment and for the purpose of furthering his master's business, and that the defendant would be liable whether the injury was wilfully or negligently inflicted.

In *Dealy* v. *Coble* (1906) 112 App. Div. 296, 98 N.Y. Supp. 452, where the driver of the defendant's sleigh struck and injured a boy who had jumped on the runner a verdict for the plaintiff was held to be proper,

not imputable to his master, according as they are or are not within the scope of his employment. The decisions collected in the note below will shew how that principle has been applied in cases of the type now under discussion.[4]

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upon evidence which tended to shew that the tortious act was done by the driver in attempting to put the boy off the vehicle, that he used more force than was necessary; and that the boy, after having jumped off to avoid the first blow aimed at him, had continued to run along holding the back of the sleigh with his hands, with the evident purpose of getting on the runner again.

In *Cleveland* v. *Newsom* (1880), 45 Mich. 62, it was held that the trial judge had correctly instructed the jury that, if the servant had "wantonly, wilfully, and intentionally" run over the plaintiff, he would not have been within the scope of his employment. This ruling would seem to be a categorical recognition of the doctrine referred to in the text. In *Wood* v. *Detroit City R. Co.* (1884) 52 Mich 402, 18 N.W. 124, the same court, in the course of its opinion, remarked that if the gravamen of the action had not been negligence, the facts were such as might have rendered it necessary to determine whether the defendant was responsible under cases like *Wright* v. *Wilcox*, supra. This remark would seem to evince some inclination to abandon the doctrine applied in the earlier case. But the position of the court still remained uncertain, when it was reviewing the facts in *Vernon* v. *Cromwell* (1895) 104 Mich. 62, 62 N.W. 175. There it refused to declare that, if the evidence had conclusively established the fact that the servants in question had been "voluntarily running" the horses which came into collision with the plaintiff's carriage, the defendant would not have been responsible. The latest decision by this court which bears upon the subject, *Canton* v. *Grinnell* (1904) 138 Mich. 590, 101 N.W. 811, proceeded upon the assumption that the defendant would be liable for an assault committed by his truckman, if within the scope of their employment. The position thus taken may, perhaps be regarded as indicating a definitive abandonment that wilful and negligent acts stand upon a different footing.

In *Limpus* v. *London General Omnibus Co.* (1862: Exch. Ch.) 1 H. & C. 526, 9 Jur. N.S. 333, 11 W.R. 149, 32 L.J. Exch. 34, 7 L.T.N.S. 641, a driver of an omnibus while driving his master's omnibus, on one of its trips from A. to B., in regular course, at a point in the road, wilfully and on purpose, and contrary to the express orders of his master, wrongfully and illegally endeavoured to hinder and obstruct the passage along the road of another omnibus belonging to a rival proprietor, by drawing his omnibus across the road. Martin, B., directed the jury, that "if they believed that the real truth of the matter was that the defendant's driver, being dissatisfied and irritated with the plaintiff's driver, whether justly or unjustly, by reason of what had occurred, and in that

13. Liability considered with reference to the element of ownership.—(*a*) *Vehicle or horse owned by master.*—It is always

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state of mind acted recklessly, wantonly, and improperly, but in the course of his service and employment, and in doing that which he believed to be for the interest of the defendants, then the defendants were responsible for the act of their servant; that, if the act of the defendants' driver, in driving as he did across the road to obstruct the plaintiff's omnibus, although reckless driving on his part, was nevertheless as an act done by him in the course of his service, and to do that which he thought best to suit the interest of his employers and so to interfere with the trade and business of the other omnibus, the defendants were responsible, that the liability of the master depended upon the acts and conduct of the servant in the course of the service and employment, and that the instructions given to the driver not to obstruct another were immaterial; but that if the true character of the driver's act was that it was an act of his own, and in order to effect a purpose of his own, the defendants were not responsible." These directions were held to be correct, and a verdict for the plaintiff was sustained. Crompton, J., said: "It appears by the evidence of the driver that he was driving the defendants' omnibus in an improper way, for, without intending to touch the horses of the plaintiff's omnibus he drove so near to it, for the purpose of keeping it from passing him, that he caused the accident. It is not necessary to say what would have been the case if the driver had used the omnibus so as to block up the road; as it is, I cannot see that the direction of my brother Martin was necessarily wrong. If the matter had come before us on a motion for a new trial, it may be that I should have agreed with my brother Wightman, for the question might have been presented in such a way as to bring it more clearly before the jury, and it is possible that some expressions of the learned judge, may have led them to a wrong conclusion. But the question now is, whether any of the exceptions shew that the learned judge was wrong in point of law. Throughout his summing up he left it to the jury to say whether the injury resulted from an act done by the driver in the course of the service and for his master's purposes. That is the true criterion." Willes, J., after expressing his approval of the statement of Martin, B., with regard to the immateriality of the fact that the defendants' driver had been specially instructed not to obstruct any other driver, proceeded thus: "But there is another construction to be put upon the act of the servant in driving across the other omnibus; he wanted to get before it. That was an act done in the course of his employment. He was employed not only to drive the omnibus, which alone would not support this summing up, but also to get as much money as he could for his master, and to do it in rivalry with other omnibuses on the road. The act of driving as he did, is not inconsistent with his employment, when explained by his desire to get before the other omni-

competent to shew that the defendant was the owner

bus." Byles, J. said: "The direction amounts to this, that if a servant acts in the prosecution of his master's business for the benefit of his master, and not for the benefit of himself, the master is liable, although the act may in one sense be wilful on the part of the servant." Blackburn, J., said: "It is admitted that a master is responsible for the illegal act of his servant, even if wilful, provided it was within the scope of the servant's employment, and in the execution of the service for which he was engaged. That the learned judge told the jury, and perfectly accurate, but that alone would not be enough to guide them in coming to a correct conclusion. . . . . No doubt what Mr. Mellish said is correct; it is not universally true that every act done for the interest of the master is done in the course of the employment. A footman might think it for the interest of his master to drive the coach, but no one could say that it was within the scope of the footman's employment, and that the master would be liable for damage resulting from the wilful act of the footman in taking charge of the horses. But, in this case, I think the direction given to the jury was a sufficient guide to enable them to say whether the particular act was done in the course of the employment. The learned judge goes on to say that the instructions given to the defendants' servant were immaterial if he did not pursue them (upon which all are agreed); and at the end of his direction he points out that, if the jury were of opinion 'that the true character of the act of the defendants' servant was that it was an act of his own and in order to effect a purpose of his own, the defendants were not responsible.' That meets the case which I have already alluded to. If the jury should come to the conclusion that he did the act, not to further his master's interest or in the course of his employment, but from private spite, and with the intention of injuring his enemy, the defendants were not responsible. That removes all objections, and meets the suggestion that the jury may have been misled by the previous part of the summing up."

In *Howe* v. *Newmarch* (1866) 12 Allen, 49, the plaintiff's evidence tended to shew that, when he was about twelve feet away from a baker's wagon which was standing on the sidewalk along which he was passing, the driver suddenly ran out of a house, threw his basket upon the wagon, and jumped to get on the seat, and that the horse immediately started and struck the plaintiff as he was trying to escape. It was held that the court had erroneously refused an instruction, that "if at the time of the injury the defendants' servant was engaged in the business of the defendant, and within the scope of his duty, as such servant, and he drove the horse over the plaintiff and did him an injury; the defendant is responsible, whether the act was done wilfully or negligently."

In *Brown* v. *Boston I. Co.* (1901) 178 Mass. 644, 59 N.E. 644, where children who had broken an ice axe belonging to defendant while the driver of defendants' ice-wagon was absent, were injured by the punishment

of the vehicle or horse which the actual tortfeasor was managing

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inflicted on them by him when he returned, defendant was held not to be liable. The court said: "The ground on which the plaintiffs contend that the defendant is liable for Sprague's acts in beating them with the handle of the ice-axe is that, from what Sprague said at the time, the jury were warranted in finding that he punished them in whole or in part for the purpose of making it easier for him to deliver ice from the defendant's ice cart in the future, without an assistant and with slight care of the tools, and therefore the case is brought within *Howe* v. *Newmarch*, 12 Allen, 49. But in this case Sprague's attack on the boys was an act of punishment inflicted for a past injury to his master's property, and not in doing an act which he had to do if he performed the duty owed by him to his master. It is not within the scope of the authority of a servant, to whose custody his master's property has been confided, to undertake to secure it from future injury by committing the illegal act of inflicting personal chastisement on persons who have done damage to it in the past."

In *Chicago City R. Co.* v. *Moak* (1891) 44 Ill. App. 7, it was held that, the act of the driver of a street car in slapping with his lines at a boy who was running along the street opposite and near to the car platform was not within the scope of his employment.

In *Dinsmoor* v. *Wolber* (1899) 85 Ill. App. 152, where the servant of a farmer drove his master's wagon on the wrong side of the road and brought it into collision with another vehicle, the master was held to be liable irrespective of whether the tortious act was wilful or merely negligent.

In *Eckert* v. *St. Louis Transfer Co.* (1876) 2 Mo. App. 36, where a verdict in favour of a person who had been run over by defendant's wagon, the court explicitly rejected the doctrine that a master is not liable for the wilful act of his servant.

In *Schaefer* v. *Osterbrink* (1886) 67 Wis. 495, 58 Am. Rep. 875, a servant had driven his master's sleigh against the plaintiff's, an exception was taken to the refusal of the court to submit to the jury the question whether the servant's conduct was wilful and to instruct them, that, if it was wilful the plaintiff could not recover as against the master. Defendant's counsel relied upon the argument that the rule under which a carrier is liable for injuries caused to a passenger by the wilful acts of his servant, was not applicable to a case like the one under review. Discussing this contention, the court said: "Two teams upon a public highway, each with a sleigh or vehicle, coming in close proximity to each other, the driver of each most certainly owes a duty to those riding with the other. That duty is created by law, and requires each driver to proceed with care and circumspection and with reference to the shifting situation of the other. When such driver is a servant acting within the course and scope of his employment, then such duty rests upon the master as well as the servant. *Limpus* v. *L. G. O. Co.* 32 Law J. Exch. (N.S.) 34. The employer in such case, being

at the time of the accident in question.[1] If it appears not only that he was such owner, but also, that the tortfeasor was hired to discharge the function of management, a primâ facie presumption arises that he was acting within the scope of his employment when the injury was inflicted.[2] But evidence of the defendant's ownership is not of

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responsible for the performance of such duty by his delegated agency, can no more escape liability for such failure when it occurs through his agent's gross negligence or wilful misconduct, than he can when it is by reason of his agent's want of ordinary care. Such being the law in this state, the refusal to submit or instruct as thus requested was not error, because the jury were expressly charged, in effect, that in no event could they allow Louis any punitory or exemplary damages, nor anything more than compensatory damages. This entirely eliminated from the case the question of wilful misconduct."

In *McKay* v. *Irvine* (1882) 11 Biss. 168, a Nisi Prius case, the jury were instructed that the owner of a race horse is liable for the act of his jockey in intentionally fouling another horse in a race.

In *Hawes* v. *Knowles* (1874) 114 Mass. 518, 19 Am. Rep. 383, it was held that, where the injurious act of a servant who, in the course of his employment, drives against the carriage of another person is wanton as well as heedless, his conduct will enhance the damages against the master.

[1] In *Sibley* v. *Nason* (1907) 196 Mass. 125, 81 N.E. 887 (plaintiff while rightfully on the running board of an electric car was struck by the hub of the wheel of a wagon).

[2] In *Beard* v. *London Gen. Omnibus Co.* (1900) 2 Q.B. (C.A.) 530, 83 L.T.N.S. 362, Romer L.J., remarked: "If an omnibus belonging to the defendant company is being driven along a London street by a driver who appears to be authorized to do so, I think there is a presumption that he was authorized to drive."

In *Rumpf* v. *Fresh Food & Ice Co.* (1907) 7 New So. Wales, St. Rep. 260, 24 W.N. 50, it was proved that a boy by whose negligence in riding a horse the plaintiff was injured, was in the employ of the defendant; that the horse he rode belonged to the defendant; that he was carrying an empty milk-can; and that the defendant was carrying on business as a milkman. *Held*, sufficient evidence to throw on the defendant the onus of proving, if they could, that the boy was not at the time of the accident acting in the course of his employment.

In *Curley* v. *Electric Vehicle Co.* (1902) 68 App. Div. 18, 74 N.Y. Supp. 35, a primâ facie case was held to have been made out, where the testimony shewed that the driver of the electric cab which collided with plaintiff's horse had upon his hat a plate with the words, "Electric Vehicle" and a number; that the same words were upon a plate upon the

itself sufficient to create that presumption.[3] Such evidence is equally consistent with the inference of a bailment, gratuitous, or otherwise,[4] or with the inference that the instrumentality

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cab; and that the drivers in the employ of the defendant from the time it began business, until the month of June before the accident, wore a similar inscription upon their hats.

The doctrine stated in the text was also affirmed in *Stewart* v. *Baruch* (1905) 93 N.Y. Supp. 161, 103 App. Div. 577. But there it was held that the weight of evidence shewed that the chauffeur of an automobile was using it for his own purposes.

A different doctrine was applied in *Sarver* v. *Mitchell* (1907) 35 Pa. Super. Ct. 69, where, in an action against the owner of an automobile for causing the death of a child while the automobile was in charge of the owner's chauffeur, it was held that evidence of the ownership of the machine was not sufficient in itself to charge the defendant with liability, but that the plaintiff must go further, and shew that the machine was being used in the course of the master's business.

[3]In *Baird* v. *Hamilton* 1 Sc. Sess. Cas. 797, the following remarks were made by Lord Glenlee: "There is something founded in our statute which views the mere connection of dominion as inferring a liability for injury done by anything which is our property. I do not justify the feeling, but it is a natural one, and we see it exemplified in the doctrine of deodand; and there is a great deal in the simple ground that the damage was done by the defender's horse and cart, when no one was looking after them; nor is it a sufficient defence for the party to say, "I hired a servant to attend to it. The master is liable for the carelessness of his servant. It is essential, however, that the damage should arise from the way and manner of doing the master's work. For suppose a servant takes offence at another man, and horsewhips him, though at the time he is conducting his master's cart, yet the damage is not inflicted in the doing of it—he is acting for himself, and the master is not liable. But in this case the injury was done by the defender's horse and cart, and by the negligence of his servant."

[4]*Powell* v. *McGlynn* (1902) 2 Ir. R. (C.A.) 164, 194, 224. In that case, where the plaintiff was knocked down and injured by a runaway pony attached to a trap, which had been driven by M., but was left standing by him in the street when it took fright, the pony and trap were the property of B. *Held*, by the Court of Appeal, that there was no evidence to support the finding in favour of the plaintiff, that no presumption of the relationship of master and servant arose from the fact of M. driving B.'s pony and trap; that the offer to pay expenses was made on the basis of B. having lent the pony and trap to M., and could not be treated as an admission of liability on another hypothesis; that the evidence offered being at least equally consistent with a state of facts on which B. would

was being used without the knowledge or consent of the owner.[5]

not be liable, he was entitled to a nonsuit or a direction in his favour. Fitzgibbon, L.J., says: "No doubt, ownership of the thing which does the mischief often supplies prima facie evidence sufficient to make the owner responsible for the damage. If we refer, for example, to the barge and omnibus cases, the person in charge was manifestly acting as the servant of someone, and presumably the owner. In such cases it is more frequently a question of the identity of the master, than of the existence of the relation of master and servant between the negligent person and somebody else. Here a runaway pony did the mischief; the pony belonged to Bradlaw; the use of the pony and trap had been given by Bradlaw to McGlynn; and the injury occurred while McGlynn was in charge. But nothing further was proved."

In *Braverman* v. *Hart* (1907) 105 N.Y. Supp. 107, it was held that the owner of an automobile was not liable for an injury caused by the negligence of a person not under his control or direction, to whom he had delivered the machine under an agreement that he was to use it for hire, and pay the purchase price out of the money derived from its use.

In *Shields* v. *Edinburgh & G.R. Co.* (1856) 18 Sc Sess. Cas. 2nd Ser. 1199, the defendant was held not to be liable for injuries inflicted by the defendants' van and horse while they were being driven by the servant of an independent contractor.

[5]In *Lewis* v. *Amorous* (1907) 3 Ga. App. 50, 59 S.E. 338, where the declaration in an action for the death of a child who had been run over by an automobile alleged that the defendant "permitted one, P., to take and run it," a demurrer was held to have been properly sustained. The effect of the dcision so far as the substantive rights of the plaintiff were concerned was stated as follows: "The owner or keeper of an automobile will not be held liable for a negligent homicide committed therewith in a public street by a person old enough to be discreet and responsible in the eyes of the law, who took the machine, without the knowledge of the former, from a shop or garage where it had been left, although the person who thus took and drove the machine was inexperienced in its operation and unlicensed to run it, notwithstanding the leaving of the automobile at the shop or garage furnished the opportunity whereby such person got possession of it.

In *Doran* v. *Thomson* (1907) 74 N.J.L. 445, 66 Atl. 897, the court thus discussed the sufficiency of the declaration: "The first and third counts plainly disclose no cause of action. They are apparently based upon the erroneous assumption that, because the defendant loaned his motor vehicle to some one over whom he had no direction or control at the time of the accident, he shall be held liable for the mere loaning. But no such liability rests upon him. . . . These counts contain no allegation that the vehicle was used at the time in the owner's business; nor is there any allegation therein that the vehicle was under the control or management of the defendant, or that the person driving it was under

(*b*) *Vehicle owned by servant or third person.*— If the rest of the evidence is susceptible of the construction that the tortious act complained of was within the scope of the servant's employment, the mere fact that the vehicle or horse which he was managing when the injury was inflicted belonged to himself or a third person will not prevent the aggrieved party from recovering. The action is deemed to be maintainable, according as his use of those instrumentalities was or was not authorized, expressly or impliedly, by the master.[e]

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the control of the defendant, or that the relationship of master and servant existed between the defendant and the driver. The second count, however, although loosely drawn, we think may stand. It alleges that the defendant did negligently direct, consent, and allow the motor vehicle to be operated by a member of his family, and that, while such person was operating the same for the defendant, the accident was caused by the carelessness, negligence and incompetency of the person so operating the same. It in effect avers the relationship of master and servant, and that the accident was caused by the negligence of the servant while operating the motor vehicle for the master."

[e]In *Patten* v. *Rea* (1857) 2 C.B.N.S. 606, 26 L.J.C.P. 235, 3 Jur. N.S. 892, 40 Eng. L. & Eq. 329, where the general manager of a horse-dealer drove his own gig against plaintiff's horse, while he was on his way to collect a debt due to his master and afterwards to consult a doctor, the question whether the defendant was liable was held to have been properly submitted to the jury, although the vehicle belonged to the servant himself and there was no evidence of any express command from the servant himself to use it on the given occasion. Cockburn, C.J., was of opinion that any significance which might otherwise have been attached to these elements was overcome by that part of the evidence which shewed that the vehicle and horse were kept by the defendant free of charge to the servant, and ordinarily used by him in the performance of journeys about his master's business, and that the master was cognizant of the course which his servant was pursuing at the time, and did not dissent. Having regard to these circumstances and the nature of the business, the employé must be assumed to have had authority to exercise his discretion as to the mode of performing his duty to his master. Williams, J., adverting to the exception taken, that the trial judge had misdirected the jury in not leaving to them the question whether the horse and gig driven by the manager were used by him on his master's business, at the instance and express request of the defendant, observed: "It clearly is not necessary in cases of this sort that there should be any express request; the jury may imply a request or assent from the general nature of the ser-

14. Liability as affected by special statutes.—With reference to an English statute which enacts that a magistrate may, in summary proceedings, inflict a penalty upon the driver of a hackney carriage or a metropolitan stage carriage, and also provides that compensation may be awarded, either against the driver's employer or the driver himself, to the party

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vant's duty and employment. There was ample evidence of such implied request or assent here."

In *Turcotte* v. *Ryan* (1907) 39 Can. Sup. 8, affirming Que. Rep. 15 K.B. 472, where T., an employé of D., while in discharge of the duties of his employment, driving his own horse attached to a vehicle belonging to his employer, who also owned the harness, negligently caused injuries to C., which resulted in his death, it was held that the master and servant were jointly and severally responsible in damages. In the lower court the ground upon which the master's liability was disputed by counsel was that the master could not exercise any supervision over the work. This ground was clearly untenable if the tortfeasor was to be regarded as standing in the relation of servant to the defendant, for the purposes of the journey in question. It was, however, a point open to argument whether he was not simply a bailee in respect of the vehicle, and the rationale of the dissenting judgment of Lacoste, C.J., in the lower court, was that this was really his position. But in view of the fact that he was driving in the discharge of the duties which he had been engaged to perform, such a conclusion could, it is apprehended, only have been justified by clear and specific evidence that he had ceased for the time being to be a servant. Such evidence is not disclosed by the report.

In *Goodman* v. *Kennell* (1827) 3 Car. & P. 167, 1 Moore & P. 241, a person occasionally employed by the defendant as his servant, being sent out by him on his business, took the horse of another person, in whose service he also worked, and, in going, rode over the plaintiff. At the trial, it was left for the jury to say, whether or not the horse was taken by the servant with the implied consent or authority of the defendant. The following statement made by Parke, J., to the jury must be taken with the qualifications indicated by the footing upon which the case was thus submitted to them: "I cannot bring myself to the length of supposing that, if a man sends his servant on an errand, without providing him with a horse, and he meets a friend who has one, who permits him to ride, and an injury happens in consequence, the master is responsible for that act." A new trial was moved for, but refused.

In *Wilson* v. *Pennsylvania R. Co.* (1899: N.J.L.) where damages were claimed for injuries sustained in a collision with a wagon belonging to an express company, driven by a person employed by a railway company to carry the mail-bags, which had previously been carried on foot or in a push cart, it was held that a nonsuit was proper as there was no evid-

aggrieved by the misconduct, it has been held that the acceptance of compensation by that party precludes him from afterwards maintaining an action for damages, even though he may not have understood the legal effect of the acceptance, and the compensation is not adequate to the damage done.[1]

It has been held that the Massachusetts enactment (Rev. Stat. ch. 51, § 3) which imposes a penalty upon any person who violates the rules prescribed for the regulation of traffic in highways, and also provides that he shall be liable for all damages sustained by reason of his offence, does not operate so as to preclude the injured party from maintaining a common law action against the master of the tortfeasor.[2]

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ence that the company furnished the wagon or authorized or even knew of its use.

In *Shelton* v. *Toronto* (1887) 13 Ont. 139, a servant who had been dispatched to procure a wrench for the purpose of shutting off the water from a street hydrant which had burst, had, without the knowledge or consent of defendants, wrongfully taken possession of a horse and buggy belonging to defendants' city commissioner, and therewith ran down the plaintiff. *Held*, that defendants were not liable.

[1] *Wright* v. *London General Omnibus Company* (1877) 46 L.J., Q.B. Div. 429; 25 W.R. 647; 2 L.R., Q.B. Div. 271 (Act of 6 & 7 Vict. ch. 86, § 28). Cockburn, C.J., said: "The argument most relied on for the plaintiff was that he was not a complaining party, and that the compensation was awarded to him contrary to his wishes, and, consequently, the award does not bind him. It is true that the plaintiff did not originally ask for the exercise of the jurisdiction given by the section, but in the course of an inquiry upon a complaint made by other parties, the magistrate expresses his intention of awarding compensation, and asks if £10 will be sufficient. The plaintiff answers that it will not; but, nevertheless, when the magistrate proceeds to award this amount to him, he takes it. It seems to me that by taking the £10 he consented to the exercise of the jurisdiction, and was bound by it."

[2] *Reynolds* v. *Hanrahan* (1868) 100 Mass. 313. The court distinguished the earlier case, *Goodhue* v. *Dix* (1854) 2 Gray, 181, where it had been laid down, in action brought *under the statute* that the master was not liable for the damages specified therein, there being nothing in the facts submitted which shewed that he was in any way implicated in the conduct of his servant.

C. B. LABATT.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

HUSBAND AND WIFE—CRUELTY—WILFUL OR RECKLESS COMMUNICATION OF DISEASE BY HUSBAND—EVIDENCE.

In *Browning* v. *Browning* (1911) P. 161, a divorce case, it was held by Evans, P.P.D., that where a wife alleged cruelty by her husband in communicating to her a venereal disease, it is sufficient for her to prove the fact that she was so infected, and that the burden is then on the husband of shewing that the disease was communicated in such circumstances as not to amount to legal cruelty.

PROBATE—FOREIGN TESTATOR—ENGLISH AND GERMAN WILLS—SEPARATE EXECUTORS—LIMITED GRANT TO PERSONS ENTITLED TO GENERAL GRANT.

Re Brentano (1911) P. 172. In this case a testator domiciled abroad made two wills, one of his property in England, and the other of his property in Germany, and named separate executors of each will. On application for probate by the executors of the will of the English property, Evans, P.P.D., held that the usual rule of not making a limited grant to persons entitled to a general grant, might be departed from, and he made a grant to the English executors limited to the property in England and a cæterorum grant to the German executors.

WILL—PROBATE—EXECUTOR NEXT OF KIN—ACTION BY EXECUTOR TO REVOKE PROBATE—ESTOPPEL—LACHES.

Williams v. *Evans* (1911) P. 175. In this case a testator who died in November, 1908, left a will appointing his widow and the plaintiff, his next of kin, his executors. The widow took probate of the will in January, 1909, and died the same day. The plaintiff did not join the widow in the application for probate, believing that the will was invalid on the ground that the testator was of unsound mind. In March, 1909, he consulted his solicitors as to contesting the will, and was advised that in their view it was too late to impeach it, and that in any event he would not be prejudiced in proceedings to impeach the will by taking probate. Accordingly, in May, 1909, he took out double probate of the alleged will, having at the time knowledge of all

the facts on which he now claimed to set the will aside. He acted as executor and intermeddled with the estate, and the question of law was, whether on these facts, either on the ground of estoppel or laches, he was debarred from contesting the validity of the will. Horridge, J., decided that the taking of probate did not constitute an estoppel, and that there was no rule of the Probate Court which prevented a person who takes out probate from afterwards impeaching the will; and that there had not been such laches on the part of the plaintiff as to make it inequitable for him to contest the validity of the will.

PRACTICE—DISCOVERY—INQUIRY AS TO MATERIAL FACTS.

Nash v. *Layton* (1911) 2 Ch. 71. This action was brought to enforce a charge given for money loaned. The defence was, that the plaintiff was a money-lender and had not complied with the Money Lenders' Act in making the loan for which the charge was given. The defendant claimed to examine the plaintiff for discovery, as to other loans made by the plaintiff within a reasonable time before the loan to the defendant, and on what security, and at what rates they were made, and generally into the circumstances and terms of such loans. Joyce, J., held this was inadmissible, but the majority of the Court of Appeal (Cozens-Hardy, M.R., and Buckley, L.J.) overruled his decision, Moulton, L.J., dissenting.

SOLICITOR—LIEN—TRUST DEED—COSTS INCURRED PRIOR TO TRUST DEED—DEBENTURE HOLDER.

In re Dee, Wright v. *Dee* (1911) 2 Ch. 85. In this case a company having determined to issue debentures to be secured by a trust deed, the person proposed as trustee appointed a solicitor to act for him in connection with the trust (the company being represented by another solicitor), and under this retainer the solicitor investigated the title of the trust property, and approved of the trust deed on behalf of the trustee. An order having been made for taxation of the solicitor's costs, he claimed to be entitled as against both the trustee and the debenture holders to a lien on the trust deed for all costs properly incurred in relation to the trust, notwithstanding they were incurred prior to the execution of the deed. The taxing Master gave effect to this claim, and his decision was affirmed by Eady, J., whose decision was also affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Moulton, and Buckley, L.JJ.).

DECLARATORY JUDGMENT—RULE 289—(ONT. JUD. ACT, S. 57(5)).

In *Burghes* v. *Attorney-General* (1911) 2 Chy. 139 the court (Warrington, J.) made a declaratory judgment, declaring that certain forms issued by the Revenue Commissioners requiring the plaintiff to make certain returns, were unauthorized, and that the plaintiff was not bound to comply therewith.

EXECUTOR—PLEDGE BY EXECUTOR OF CHATTELS OF TESTATOR—PLEDGEE.

Solomon v. *Attenborough* (1911) 2 Ch. 159. This was an action brought by the trustees of the will of Moses Solomon to recover a quantity of plate belonging to the estate of their testator which had been pledged with the defendants in the following circumstances. The testator died in 1878, and by his will appointed two executors, and gave certain pecuniary legacies, and his residuary estate to his executors upon trust for sale and distribution as therein mentioned. In 1892 one of the executors without the knowledge of his co-executor, pledged the plate in question with the defendants as security for an advance which he misappropriated. At the time of the pledge all the debts and legacies had been paid, but the residuary estate had not been completely distributed. It was contended by the plaintiffs that the pledge in such circumstances was unauthorized and invalid, because it was claimed that the debts and legacies having been paid the executors held the residue as trustees; but Joyce, J., held that, notwithstanding the lapse of time, the executor had the legal right to pledge the goods in question, and that the defendants were entitled to hold them subject to redemption.

POWER OF APPOINTMENT BY DEED OR WILL—EXERCISE OF POWER BY WILL IN FAVOUR OF ALL OBJECTS EQUALLY—SUBSEQUENT APPOINTMENT BY DEED TO TWO OF SEVERAL OBJECTS—ADEMPTION—DOUBLE PORTIONS.

In re Peel, Biddulph v. *Peel* (1911) 2 Ch. 165. In this case a testator having under his marriage settlement a power of appointment by deed or will in favour of his children, by his will dated in 1869 appointed equally in favour of all of the children. Subsequently, by deeds made in 1897 and 1901, he appointed a seventh share to each of two of the children. He died in 1910, and the question arose as to the right of the appointees under

the will and deeds, and Joyce, J., held that the rule against double portions applied, and that therefore the children to whom appointments had been made by deed, were not entitled also to any share under the appointment made by the will.

BAILMENT—BAILEE—CLAIM BY THIRD PARTY TO GOODS BAILED—DUTY OF BAILEE—NOTICE OF CLAIM TO BAILOR—NOTICE TO BAILOR OF CLAIM OF THIRD PARTY—ORDER OF MAGISTRATE FOR DELIVERY OF GOODS—HUSBAND AND WIFE.

Ranson v. *Platt* (1911) 2 K.B. 291. In this case the Court of Appeal have failed to agree with the decision of the Divisional Court (1911) 1 K.B. 499 (noted ante, p. 259). It may be remembered goods were bailed to the defendant by the plaintiff, a married woman, living apart from her husband, who subsequently claimed them. The bailee having refused to deliver the goods to the husband was summoned before a magistrate at the instance of the husband, he informed the magistrate that the goods had been left with him by the wife, but though having ample time to notify the wife of the claim and knowing her address he failed to do so, and the magistrate, without requiring the wife to be notified, made an order for the delivery of the goods to the husband. The defendant relied on this order as a protection against the claim of the plaintiff, and the Divisional Court so held; but the Court of Appeal (Williams, Moulton and Farwell, L.JJ.) came to the conclusion on the evidence that the application to the magistrate was a mere matter of arrangement between the husband and the defendant, and that it was the duty of the defendant, in the circumstances, to have notified the wife of her husband's claim to the goods, and not having done so, the order of the magistrate was no protection against her claim. Primâ facie Williams, L.J., admits that if the defendant had acted under the compulsion of the order it would have been a protection, but he concludes on the evidence that he did not really do so, because he was not bound by the order to deliver up the goods until paid his charges for warehousing them, and the husband not being able to pay them, he agreed with him that he, the defendant, should buy some of them and pay himself out of the proceeds, and in this respect also he did not act under the compulsion of the order, but by arrangement with the husband.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

JOHNSTON *v.* THE KING. [May 8.

Petition of right—Contract—Powers of Commissioners of the Transcontinental Railway—Liability of Crown—Construction of statute—3 Edw. VII. *c.* 71.

The National Transcontinental Railway Act, 3 Edw. VII. c. 71 (D.), does not confer powers upon the Commissioners of the Transcontinental Railway in respect to the inspection and valuation of lands required for the purposes of the "Eastern Division" of the railway; consequently, a petition of right will not lie for the recovery of remuneration for services of that nature.

Judgment appealed from (13 Ex. C.R. 155) affirmed, IDINGTON, J., dissenting.

M. G. MacNeil, for appellant. *Newcombe,* K.C., for respondent.

Ont.] [May 15.

CITY OF WOODSTOCK *v.* COUNTY OF OXFORD.

Municipal corporation—City and county—Separation—Agreement as to assets—Subsequent discovery of funds not included—Action for city's share.

In 1901 the town of Woodstock was incorporated as a city, and in February, 1902, the city and the county of Oxford entered into an agreement, ratified by their respective by-laws, purporting to settle all questions between them arising out of the erection of the town into a city. This agreement was acted upon until December, 1907, when the city, claiming to have discovered the existence of a fund of $37,000, collected from the ratepayers of the several municipalities composing the county, which had not been considered in the settlement, brought action for its share of said fund, but did not ask for rescission or modification of the agreement.

Held, affirming the judgment of the Court of Appeal (22 Ont. L.R. 151) that in the absence of fraud or mutual mistake the agreement was a bar to such action.

Watson, K.C., for appellant. *Bicknell,* K.C., and *S. G. McKay,* for respondent.

Ont.] [May 15.

LAIDLAW *v.* VAUGHAN-RHYS.

Timber license—Crown lands in British Columbia—Real estate —Personalty—Contract—Sale—Exchange—Consideration— Payment in joint stock shares—Vendor's lien—Evidence— Onus of proof—Pleading and practice.

A sale of rights under licenses to cut timber on provincial Crown lands in British Columbia is a contract for the sale of interests in real estate, and the timber berths are subject to a vendor's lien for the unpaid purchase-money.

The doctrine of a vendor's lien for unpaid purchase-money is applicable to every sale of personal property over which a court of equity assumes jurisdiction. *In re Stuckley* (1906) 1 Ch. 67, followed.

In order to protect himself against the enforcement of a vendor's lien, a defendant relying on the equitable defence of purchase for value without notice is bound to allege in his pleadings and to prove that he became purchaser of the property in question for valuable consideration and without notice of the lien. *In re Nisbett and Potts' Contract* (1905) 1 Ch. 391, (1906) 1 Ch. 386, followed. *Whitchorn Brothers* v. *Davison* (1911) 1 K.B. 463, distinguished.

Appeal dismissed with costs.

Nesbitt, K.C., and *Coutlee,* K.C., for appellant. *Travers Lewis,* K.C., for respondent.

(Leave to appeal to the Privy Council was refused on the 29th of July, 1911.)

Alta.] [May 15.

ALBERTA RY. & IRRIGATION CO. *v.* THE KING.

Irrigation—Obstruction of highways—Bridges—Construction of statutes.

The North-West Irrigation Act, 1898 (61 Vict. c. 35), provided by s. 11(*b*), that companies incorporated for the construction and operation of works contemplated by that statute should

submit their scheme of works to the Commissioner of Public Works of the North-West Territories, and apply to him for permission to construct and operate the works across road allowances and surveyed public highways which might be affected by them; by s. 16, that his approval of the scheme and permission for construction across the road allowances and highways should be obtained previous to the authorization of the works by the Minister of the Interior, and by s. 37, that, during, construction and operation of the works, they should "keep open for safe and convenient travel all public highways theretofore travelled as such, when they are crossed by such works," and construct and maintain bridges over such works. The Commissioner had the control of all matters affecting changes in or obstructions to road allowances and public highways vested in the local government, "including the crossing of such allowances or public highways by irrigation ditches, canals or other works." On the approval of the scheme of works in question, the Commissioner granted permission for their construction and maintenance across the road allowances and public highways shewn in the memorial of the appellants subject to "the provisions of s. 37 of the said North-West Irrigation Act, and without any special conditions imposed.

Held, reversing the judgment appealed from (3 Alta. L.R. 70), the CHIEF JUSTICE and IDINGTON, J., dissenting, that the absolute statutory duty imposed upon the appellant company by s. 37 of the North-West Irrigation Act, 1898, related solely to public highways which were publicly travelled as such previous to the construction of the irrigation works by the company; that, as no further obligation was imposed at the time permission for the construction of the works was granted, by the officer in whom the power of specifying further conditions was vested the company was under no obligation to erect bridges across their works at points where they crossed road allowances or public highways which have become publicly travelled as such since the construction of the works.

Per DAVIES and DUFF, J.—In the construction of modern statutes conferring compulsory powers, including powers to interrupt the exercise of public rights, questions as to what conditions, obligations or liabilities are attached to or arise out of the existence of such powers are primarily questions of the meaning of the language used or of the proper inferences respecting the legislative intention touching such conditions, obligations

and liabilities to be drawn from a consideration of the subject-matter, the nature of the provisions as a whole and the character of the objects of the legislation as disclosed thereby.

Appeal allowed with costs.

Ewart, K.C., and *E. F. Haffner*, for appellants. *Woods*, K.C., for respondent.

Ont.] [June 1.

CROWN LIFE INS. CO. *v.* SKINNER.

Appeal—Final judgment—Action for commissions—Judgment for plaintiff—Reference—Further directions and costs reserved.

In an action against an insurance company by the executrix of an agent for commissions on policies and renewals alleged to have been earned by testator the trial judge gave judgment for the plaintiff, ordered an account to be taken and reserved further directions and costs. His judgment was sustained by the Court of Appeal.

Held, FITZPATRICK, C.J., dissenting, that the judgment of the Court of Appeal was not a final judgment for which an appeal would lie to the Supreme Court of Canada.

G. F. Henderson, K.C., for plaintiff. *Mowat*, K.C., contra.

N.B.] [June 1.

FRANCIS KERR CO. *v.* SEELY.

Lease—Water lots—Status of lessee—Injunction.

S. is a lessee under lease from the city of St. John of a water lot in the harbour and the F. K. Co. are lessees of the next lot to the south, and there are other lots to the south between that of S. and the foreshore of the harbour. By his lease S. has a right of access to and from his lot on the east and west sides.

Held, reversing the judgment appealed against (40 N.B. Rep. 8), IDINGTON, J., dissenting, that S. was not a riparian owner and had no rights in respect of his lot other than those given him by his lease. Hence, he could not restrain the adjoining lessee from erecting a wharf on his own lot which would cut off access to that of S. from the south a right of access not provided for in his lease.

Appeal allowed with costs.

Hazen, K.C., and *Baxter*, K.C., for appellant. *Teed*, K.C., and *Wilson*, K.C., for respondent.

Province of Ontario.

HIGH COURT OF JUSTICE.

Teetzel, J.] [July 21.

PARSONS *v.* CITY OF LONDON.

Municipal corporation—Trustee for ratepayers—Sale of municipal property—Under value—Breach of trust—Injunction.

Motion by plaintiff to continue an injunction restraining the defendants from carrying out the sale and purchase of some municipal property in the city of London. By Geo. V. c. 95, s. 10, the corporation of the city of London was authorized to sell at such price and on such terms as the council might deem expedient the City Hall, and the police station, or either of them, and the lands on which they are situated.

Held, 1. A municipal corporation is a trustee for all ratepayers and amenable to a like jurisdiction of the court as is exercised over trustees generally, and the plaintiff being a ratepayer and therefore a cestui que trust could maintain an action in his own name, on behalf of himself and other ratepayers, to restrain the corporation from carrying out a sale which would, in this case, have been a breach of trust. The strictness with which the conduct of private trustees is watched by the courts should apply in all its force to the action of a municipal corporation in its dealings as a trustee.

2. It was the duty of the council in dealing with corporation property to be careful not to sell without taking steps to insure competition, so as to obtain the best possible price. In this case no such care had been exercised and there was a primâ facie case of improvident sale and therefore a breach of trust.

Injunction continued till trial, with costs.

Rowell, K.C., and *C. Jarvis*, for plaintiff. *T. G. Meredith*, K.C., for the city of London. *J. B. McKillop*, for the Royal Bank of Canada.

Bench and Bar.

JUDICIAL APPOINTMENTS.

Hon. Louis Philippe Brodeur, K.C., to be a puisne judge of the Supreme Court of Canada in the room of Hon. Desirè Girouard, deceased. (August 11.)

Flotsam and Jetsam.

LAWLESSNESS.—The following is an extract from a paper published in the United States. The recital of this awful tragedy needs no comment. It is not merely as the writer says, an evidence of the strength of racial sentiment, but what is of more importance, it is an illustration of that spirit of lawlessness, which civilization fails to subdue, and which is on the increase: "The *Chicago Record-Herald* publishes a special despatch from the scene of the burning in Pennsylvania of a negro which asserts that the 400 men who perpetrated this awful tragedy were level-headed men, determined and cool, whose nerves had not been wrought to a pitch by liquor or excitement. The incident illustrates in a remarkable way the strength of the racial sentiment which still exists in the United States, even so far north as Pennsylvania. The crime was perhaps the most brutal of the many which have been carried out against the members of a race whose forefathers were imported into the United States against their will. The *Record-Herald* despatch further says that 'a feature of the burning was that there were almost as many women in the crowd as there were men.' Yet the crime for which the negro was thus inhumanly put to death was not an offence against women. He had shot a policeman. Himself wounded, the negro had been removed to a hospital, where he was strapped to his cot to present escape. A policeman was in charge of him. The 'orderly' mob marched into the hospital, placed a hand over the eyes of the policeman, picked up the cot, negro and bedclothing, marched three-quarters of a mile with him through the streets of the town to an open lot, set fire to the cot, with its wounded occupant still strapped thereto, piled fenceboards about the burning mass, reducing the negro to a crisp, and left for their homes."

Canada Law Journal.

VOL. XLVII TORONTO, OCTOBER 2. No. 19.

CONSTITUTIONAL CHANGES.

Constitutional Government is of such recent growth in this country, and has passed through so many changes, that it is hard for us to realize how momentous and far-reaching is the action of the Imperial Government, which has resulted in the passage of what is known as the "Veto Bill."

By this measure, as our readers know, the power of the House of Lords, one of the three great estates of the realm, and of older foundation than the House of Commons, is absolutely extinguished so far as the Government of the country is concerned. It may retard or obstruct Legislation, but it can neither alter nor amend it. The functions of the Crown have become little more than ceremonial. In the face of a triumphant majority in the House of Commons which may or may not represent on any particular measure the majority of the electors, the Sovereign is powerless, and now by the veto bill the House of Peers is equally reduced to a position of impotence.

Avoiding any discussion of the merits of the various questions out of which the present crisis has arisen, we may properly call attention to the means by which the constitutional changes referred to have been effected. Carrying to an extreme point the doctrine of responsible government it is held, and the doctrine has been carried into action, that on the advice of ministers, supported by a majority in one House the Crown may be compelled to place the other House in such a position that it must either submit to political extinction, or allow itself to become subservient to the other branch of the Legislature by a process equally destructive to its usefulness and its influence. The practical result is that the Government of Great Britain and Ireland, and to some extent that of the Empire at large, is now in the hands of a minister supported by the majority of a single cham-

ber, a majority—the number of Liberals and Conservatives being equal—composed of Irish Nationalists with a few members of the labour party. The majority thus constituted is for the time being omnipotent. From their decisions there is no appeal. For the next two years the destinies of the Empire are in their hands. Public opinion has no terrors for them, for there is no voice by which it can be expressed. Education, experience in and knowledge of, public affairs, may be found in the possession of individual ministers, but can only be exercised at the will of the triumphant majority expressed through the medium of the dictator of the Irish Nationalists.

This may or may not be a desirable state of affairs, and best for the peace and good government of the country—we are not discussing that; we are simply calling attention to the facts as they exist, and to the changes which have so suddenly, without warning, and with but little time for consideration, been made in the constitution of the British Empire.

It may be said that such a revolution, the greatest in our history since the time of the Commonwealth, has no interest for us. What matters it to us whether England is ruled by King, Lords and Commons, or by the House of Commons alone? At this moment it may not matter, but no student of history will fail to have misgivings for the future stability of the Empire.

One feature in the administration of public affairs in Great Britain, to be found in no other country, is the greatness of the service given to the public without fee or reward, or expectation of either. The unpaid magistracy comprise a body of men who, whatever their faults may be, are of great value to the State. In municipal affairs we find that the wealthiest and noblest in the land do not think it beneath their dignity to take an active part in whatever is going on to promote the interests of the people among whom they live. And in the higher spheres of public life, in the Houses of Parliament, we find the same spirit prevailing, and, alone among the Legislatures of the world, the members of that of Great Britain have never received any return in money for the time they spend, the work they do, or the expense they

incur. This proud distinction will exist no longer. Money payment for service, the mark of the professional in every walk of life, in sport as well as in business, will in future attach to the position of a member of Parliament. It may be right that it should be so. There is no doubt that there is something to be said in favour of it, but the change is a great one. It is in harmony with the constitutional changes we have been describing, and was therefore inevitable, but like the greater changes we simply record it as further evidence of the spirit in which those changes have been effected.

Interrupting, but scarcely retarding, the revolutionary proceedings now drawing to a close, came the great events of the Coronation and of the Colonial Conference. To the first of these we have already referred. The record of the second is fully before the public, but there is one question arising out of it, the importance of which may not be fully realized, and to which we would invite attention.

Our representative at that conference, who took a leading part in its proceedings, carried the doctrine of autonomy, of which he was the chief exponent, so far as to declare, on behalf of himself and his colleagues, and, of course, of the Dominion which he represented, that in the event of the British Government engaging in a war of which this country did not approve, we should be at liberty to declare our neutrality and take no part in the contest.

How this doctrine can be reconciled with that of Imperial unity we are at a loss to conceive. A simple declaration of neutrality would be of no avail unless accepted by the other party belligerent, and that could only be done by means of a treaty into which we should enter as an independent power, and not as a part of the British Empire. And suppose, what is most probable, that the other belligerent did not choose to recognize our neutrality, our ships would be liable to seizure, and our soil to invasion. True, in that case we might fight to defend our own property, but we could expect no help from the mother country.

This doctrine of neutrality simply means that in time of peace we should enjoy all the advantages of union with the Empire, and then, if trouble arose, we should find some excuse for escaping from our share of possible danger and loss, and in so doing take a position which could only lead to severance from the Empire.

The position is an unthinkable one. It is as illogical as it is humiliating, and it is one which the people of this country will never accept. There are only two courses open to us, and one or other we must be manly enough to choose. Either declare our independence, or say, what indeed goes without saying, that "if England is at war Canada is at war."

But our Imperialist friends need not be apprehensive. The British Government is not given to engaging in aggressive or unjust warfare. For centuries it has never done so. It neither suits the temper, the policy, nor the interest of the British people to do so. They may make mistakes, as perhaps they did in the case of the Crimean war, but even then the motive which led to war was not one of aggression. We may trust the Imperial authorities, especially now that our own rulers have been taken into their confidence, and consign this childish and contemptible theory of neutrality to oblivion. It is true, that sprung upon the Conference as it was at the close of the proceedings, it seemed to be accepted as a foregone conclusion, but it has since been emphatically repudiated, both in Africa, Australia and New Zealand, and so we are sure will be repudiated by Canada if ever the question is brought before us.

TRANSFER OF WAREHOUSE RECEIPTS TO BANKS.

A recently reported decision of the Court of King's Bench at Montreal, in the case of *La Banque Nationale* v. *Royer*, 20 Quebec King's Bench Reports 341, is of much interest to the wholesale traders as affecting their dealings with Canadian banks and the special securities authorized by the Bank Act, Revised Statutes of Canada (1906), chapter 29.

The Bank Act declares (sec. 2), that a "warehouse receipt,"

as that term is used in the Act, shall mean, "any receipt given by any person for any goods, wares or merchandize in his actual, visible and continued possession as bailee thereof, in good faith and not as of his own property." As pointed out by the Honourable Mr. Justice Cross, who delivered the majority judgment in the King's Bench, a warehouse receipt, in the common use of language, is understood to be a receipt issued by a warehouseman. Does the statutory definition enlarge or restrict the ordinary significance of the term "warehouse receipt" as regards banking transactions? The majority of the court in *La Banque Nationale* v. *Royer* considered that the statute gave it a wider meaning and that a clerk in the employ of wholesale grocers, to whom the possession of a part of the stock in trade was committed, was a bailee in actual, visible and continued possession within the statutory definition, although such part of the stock in trade was merely set apart in portions of a building leased by the firm to their clerk at a nominal rental. A warehouse receipt had been issued by the clerk as warehouseman for goods received from his employers, the grocery firm, actually placed in the rented portion of the building. The portion of the premises so used as a warehouse was boarded off from the other part of the building and was kept locked and the clerk kept the key. The warehouse receipt signed by the clerk, acknowledged that he had received in store at his warehouse from the grocery firm goods, as per lists certified by the subscriber, to be delivered to the order of the bank. The bank made an advance in good faith to the grocery firm on the security of this warehouse receipt. When any part of the warehoused goods were sold by the grocery firm, the clerk, as warehouseman, by arrangement with the bank, released such part on being paid the proceeds and accounted for such proceeds on the same day to the bank.

Many years ago, the Canadian Parliament in the interests of banking, passed a statute permitting certain classes of traders to issue warehouse receipts to banks, affecting goods of which such traders continued to be in possession.

Nominally this authorization to traders to become warehousemen of their own goods, was abolished by the Bank Act of 1890.

Under the operation of sec. 7 of the Act of 1880, reproduced as sec. 54 of chapter 120 of the Revised Statutes of 1886, the title of a bank, to goods for which it was holder of a warehouse receipt issued by persons of certain specified callings, who were actually owners of the goods for which they issued the receipts, was "as valid and effectual as if such owner, and the persons making such warehouse receipt or bill of lading, were different persons." These callings or classes of persons, were warehousemen, wharfingers, saw-millers, maltsters and some others. *Milloy* v. *Kerr,* 3 Ont. App. R. 360, 8 Can. S.C.R. 474.

Section 54 of ch. 120, R.S.C. 1886, was not reproduced in the Bank Act of 1890, nor in the Bank Act, R.S.C. 1906, ch. 29, but while that part of the Act was dropped, a new form of security was authorized by sec. 74 of the Act of 1890 (now sec. 88 of the Bank Act, R.S.C. 1906, ch. 29).

As to the effect of the change, it is pointed out by Mr. Falconbridge (On Banking, p. 166) that, while the fiction whereby the owner of goods would use a form of warehouse receipt for the purpose of obtaining advances on goods in his own possession, was abolished, and, instead, the thing was openly legalized: "the privilege of pledging the pledgor's own goods for advances was no longer limited to certain named classes of traders, but any person engaged in business, as a wholesale manufacturer of goods, wares and merchandise, and any wholesale purchaser or shipper of products of agriculture, the forest and mine, or the sea, lakes and rivers and any wholesale purchaser or shipper of live stock or dead stock and the products thereof, was authorized to give to the bank security, as mentioned in the Act."

Judge Cross says it is clear that the number of persons thus authorized to pledge goods, while still continuing to be in possession of them, is very large and that the Act still requires that the warehouse receipt to the bank shall have been given by

a person for goods "in his actual, visible and continued possession, as bailee thereof, in good faith, and not as of his own property."

The learned judge quotes with approval the opinion expressed by Mr. Falconbridge, that, "if the bank seeks to obtain a priority over other creditors by virtue of the Act, and the general law confers no priority, it is necessary for the bank, as against the creditors of the transferor, to shew that the transaction was in precise accordance with the provisions of the Act."

At the same time, and as evidence of a well-marked legislative intent, it is held in *La Banque Nationale* v. *Royer,* that regard is to be had to section 88, which not only clearly authorizes the taking of security from wholesale purchasers, or dealers, in a very large number of classes of commodities, in fact in most of the commodities which make up the wholesale trade, upon the security of goods belonging to them, but also expressly declares that the bank's rights, in virtue of the "security paper," are the same as if acquired by virtue of a warehouse receipt.

This being so, the element of exclusive physical possession has come to be of less significance, though it would, no doubt, continue to be an important element to be considered in cases where fraud was an issue, or where, for example, the expedient had been resorted to, to enable the bank to receive payment of a past-due debt. Per Cross, J., in *La Banque Nationale* v. *Royer,* 20 Que. K.B. 341.

The court held in that case, that, although the "warehouseman" was in the service of the insolvents and although the lease by them to him of two floors of their storehouse was made solely for the purpose of constituting him a warehouseman and of bringing the transaction with the bank into literal compliance with the Bank Act, it could not be said that the clerk was not in "actual, visible and continued possession," as bailee "in good faith." He, in fact, did exercise the control of a possessor. All consideration of fraud being eliminated, it was

for the court to give effect to the transaction in the form in which the parties chose to have it expressed, if that form be one which the law authorizes. *Yorkshire & Co.* v. *Maclure,* 21 C.D. 309.

As pointed out by Mr. Falconbridge, "It is not strictly necessary that the premises must be kept by him for the purpose of warehousing goods in general, or the goods mentioned in the receipt in particular": Falconbridge on Banking, page 170; *Re Monteith* (1885), 10 Ont. R. 529.

Judge Cross in delivering the majority judgment says:—

> "When it is considered that the classes of persons, entitled to obtain advances upon the security of goods retained in their own possession, first provided for in the year 1861, were gradually enlarged by enactments in 1865, 1871, 1872, 1880 and 1888 and that the words "or dealer in" were added in 1900 (representing a very notable enlargement) with the result that these classes of persons now include wholesale purchasers of and dealers in "products of agriculture, the forest, quarry and mine, or the sea, lakes and river, and live stock or dead stock and the products thereof," there is manifested a clear legislative intent to greatly widen, in the interests of trade, the right of wholesale traders to give security upon their stock of goods."

In the same case the bank's claim for a lien or "privilege" in respect of a second advance by the bank made after its manager had seen a statement of the firm's affairs shewing a considerable deficit was disallowed, on the ground that the borrowers were insolvent to the knowledge of the bank, when the second advance was made.

FOREIGN JUDGMENTS.

X, when riding in Paris, comes into collision with *A*, and thereby causes grave injury to *A*. *X* is proceeded against by French authorities for criminal negligence. *A* intervenes in these proceedings, as he is intitled to do by French law (see Code d'Instruction Criminelle, Arts. 1, 2, and 3) as a civil party and claims compensation from *X* for the damage done him. *X*, before the trial comes on, leaves for England. In *X*'s absence he is found guilty and judgment goes against him. In the judgment a penalty is inflicted upon *X* of £4 and a month's imprisonment. The same judgment which inflicts the penalty contains an award to *A* of provisional damages amounting to about £400 and directs an inquiry by an eminent doctor as to the actual damages to which *A* is entitled. He finds that *A* has suffered damage to the amount of £600, and judgment is entered for that amount. Proceedings are taken in England for enforcing the French judgment in favour of *A*. The defence raised is that the foreign judgment proceeded upon is a penal judgment and cannot be given effect to in an English Court (see *Huntington* v. *Attrill* [1893] A.C. 150, and see *Wisconsin* v. *Pelican Insurance Co.* (1887), 127 U.S. 265). The case comes for trial before Hamilton, J., without a jury. These are in substance the fact of *Raulin* v. *Fischer* [1911], 2 K.B. 93, 80 L.J. K.B. 811. It is held by Hamilton, J., that in the circumstances of the case the French judgment is severable, and that the portion of it awarding damages to *A* is not within the rule of international law which prohibits courts of justice from executing the penal judgments of a foreign court. The case is one which we believe has never before called for decision by an English Court. It may possibly therefore lead to an appeal, but we may venture to anticipate that the judgment of Hamilton, J., will be upheld. The French judgment in favour of *A* was not a penal judgment. It can easily be separated from the condemnation of *X* to a payment of a penalty and to imprisonment. There is in the nature of things no more reason why the French

judgment, or rather *A*'s right to compensation under the French judgment, should not be enforced in England than for not enforcing a judgment for damages payable to *A* by *X* and obtained in a purely civil action brought in France by *A* against *X*. Sir Francis Piggott has ingeniously anticipated the case with which Mr. Justice Hamilton had to deal, and has arrived at the same conclusion as his lordship (Piggott, Foreign Judgments, Part I, pp. 90, 91).—*Law Quarterly Review.*

DAWN JUDICIALLY DETERMINED.

There are numerous cases in the reports, most of them admiralty cases arising out of collisions on the water, where courts have found it necessary to estimate the degree of light existing before sunrise or after sunset. In *Cohen* v. *The Brig Mary T. Wilder,* Taney (U.S.) 567, 6 Fed. Cas. No. 2,965, Chief Justice Taney said that in the interval between the going down of the moon at an hour and a half before sunrise, and broad daylight, it may be very dark; "certainly the mere dawn of the day would not immediately dissipate the darkness which followed the going down of the moon." In *Train* v. *The North America,* 23 Fed. Cas. No. 13,853, a case of a collision off the Battery, at New York, at four o'clock in the morning of March 30, Judge Betts held it to be culpable negligence for a vessel to be lying at anchor without a light. In the *City of Troy,* 9 Ben. (U.S.) 466, 5 Fed. Cas. No. 2,769, Judge Benedict held that on a clear July morning, when the dawn was already breaking, it could not have been so dark that a barge with a light at her bow and in tow of a tug would not be plainly visible to a vessel which observed the tug and succeeded in clearing her by an ample margin, if the vessel's lookout had been alert. In *Fletcher* v. *The Cubana,* 9 Fed. Cas. No. 4,863, where a collision occurred at about four or half past four a.m. on June 19th, in latitude 25° 48′ N., longitude 62° 18′ W., the pivotal question was whether or not it was dark at the time. The witnesses on one vessel insisted that it was not, while those on the other asserted the contrary. Two wit-

nesses from New York were called, who testified that they were acquainted with the navigation of the ocean in the vicinity of the place of collision, and they stated that at that time of the year it must have been broad daylight when the vessels collided. "The court has had some hesitation in accepting this statement," said Judge Shipman, "as it is in conflict with the commonly received opinion of geographers and navigators touching the length of time which dawn precedes the morning and twilight follows the setting sun. But as the testimony is positive, and the witnesses say they have personally witnessed the state of the atmosphere in that region and at that season of the year and time of day, the court must accept their testimony as confirming that of those on board the schooner," who affirmed the same fact.—*Law Notes.*

IMPERIAL COURT OF APPEAL.

During the past week the *Times* has published two highly interesting articles on the subject of an Imperial Court of Appeal. At the forthcoming Imperial Conference the Australian Government will propose that it is desirable that the judicial functions in regard to the dominions now exercised by the Judicial Committee of the Privy Council should be vested in an Imperial Appeal Court which should also be the final Court of Appeal for Great Britain and Ireland. It is useless disguising the fact that in certain portions of our oversea dominions, especially in Australia, the Judicial Committee of the Privy Council has by no means been regarded with a favourable eye. From a logical point of view, it has always been difficult to understand why the court of final appeal from the courts of Great Britain should be the House of Lords, while in the case of the colonies final appeals should be to the Judicial Committee of the Privy Council, when, save for the changes brought about a year or two ago, the personality of those tribunals is largely identcial.

The fact that different systems of law have to be administered forms no answer, inasmuch as there is considerable diver-

gence between the Scottish and English systems, both of which are considered by the House of Lords. Rightly or wrongly, there is undoubtedly an impression steadily growing amongst our colonies that the Judicial Committee is not the strongest and most efficient tribunal that might be obtained, and considerable stress is laid upon the fact that its decisions are not binding upon the courts of this country, and it is exceedingly doubtful whether its decisions on cases coming from one part of the Empire are binding upon the courts of another. The ideal court of final resort would certainly seem to be one upon which our oversea dominions were adequately represented, and one whose decisions would be binding throughout the whole of the Empire. It would seem that the institution of such an Imperial Court of Appeal is not impossible of attainment, and no doubt the discussion at the forthcoming conference will make clear what are the feelings of our colonies with reference thereto.—*Law Times.*

The subject of manners, good and bad, is one which though not directly connected with the legal profession, has an important relation thereto as every client knows. A lawyer with good manners, pleasant address, and courteous demeanour, is always, other things being equal, ahead of a boorish and ill-mannered competitor. The acquiring of good manners is an educational process, which should begin at the very earliest age. Recently the Governor-General very pointedly called attention to the bad manners of the children of Ontario, thereby doing a great service to the country, though probably rendering himself somewhat unpopular to a class of persons whose popularity is, however, of no value. We notice an item on this subject which is going the rounds of the English papers. It appears that on a recent occasion, the Bishop of Worcester spoke to some scholars on the subject of "Manners"; and—in order to point the moral—recalled a conversation of his own with King George when he was Duke of York. Said the then Duke to the Bishop, who was at the time on his way to speak to schoolboys:—

"Why do you not ask that at public schools manners should be taught? As you know, I mix among all sorts and conditions of men, and it has been a positive distress to me to see how often when abroad Englishmen lose in the race with Frenchmen, Italians, and Germans, because of the Englishman's want of manners. The foreigners know when to bow, to shake hands, to converse, to stand up or sit down in the presence of their superiors, while the Englishman is wanting in these manners; and when vacancies have to be filled up those are the points which very often tell, and that is where the Englishman does not shine."

The people of at least some of the Provinces of the Dominion are apt to brag of their educational systems. They would have more cause to do so if they were to adopt the King's suggestion and teach manners in the public schools.

Mr. Justice Eve has decided in *Re Sir S. M. Maryon-Wilson's Estate,* [1911] 2 Ch. 58, that a Province of Canada is not a "British colony or dependency" within the meaning of those words in an investment clause in a will dated since the British North America Act. We cannot help doubting whether this decision is correct. "Colony" has been differently defined for different purposes by modern statutes, and those definitions only shew that the word may have a wider or a narrower sense in other cases. Nova Scotia and British Columbia were certainly colonies before 1867. Is it to be presumed that the scope of a very usual investment clause was automatically narrowed by the Confederation Act? Then, even if a Province of Canada is not a colony, why is it not a dependency? Neither the argument nor the judgment answers this question. The moral, however, is that conveyancers must revise the old form of colonial investment clause if they have not done so already.—*Law Quarterly.*

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

PRACTICE—DISCOVERY—PRODUCTION OF DOCUMENTS—BRIEFS OF COUNCIL—PRIVILEGED DOCUMENTS.

Curtis v. *Beaney* (1911) P. 181. This was a probate action in which the claim to probate was resisted on the ground that the deceased was of unsound mind. In her lifetime she had been a sole defendant in an action for money alleged to be due by her, and one of the plaintiffs who was also named as one of the executors of the will propounded, had acted as her solicitor in that action, and had in his possession briefs prepared by him for counsel in that action, which he objected to produce as being privileged documents, and Deane, J., held that the briefs were privileged documents as claimed.

LANDLORD AND TENANT—COVENANT TO REPAIR—BREACH OF COVENANT BY LESSEE—WASTE BY LESSEE—CONVERSION OF DEMISED PREMISES FROM CHAPEL TO THEATRE—RELIEF AGAINST FORFEITURE — STRUCTURAL ALTERATIONS — CONVEYANCING ACT, 1881 (44-45 VICT. C. 41) S. 14, SUB-SS. 1, 2, 3—LANDLORD AND TENANT ACT (ONT.) (1 GEO. V. C. 37, SS. 20, 21 (ONT.)).

Rose v. *Spicer* (1911) 2 K.B. 234. In this case a landlord sued for recovery of possession of the demised premises for breach of a covenant to repair, and an assignee of the term intervened, claiming to be relieved from the forfeiture. The facts of the case were somewhat unusual. The lease had been originally granted for 99 years for the purpose of erecting a chapel for religious worship. The chapel had been duly erected and enclosed from the highway with an iron fence. After being so used for sixty years, the chapel had ceased to be used, and the lessee, with the consent of the Charity Commissioners, had been authorized to sell the unexpired term, which he accordingly did. The lease contained the usual covenant by the lessee to repair and keep and maintain the premises in repair. Prior to the sale of the lease notice had been served on the lessee under the statute of the breach of the covenant, and the premises not having been put in repair the action of *Rose* v. *Spicer* was commenced by the landlord to recover possession. The purchasers of

the lease proceeded to convert the chapel into a theatre, and for that purpose removed the front fence, opened a new door into the building and made several other structural alterations in the interior; and, while these alterations were in progress, the lessor commenced the action of *Rose* v. *Hyman* to restrain the assignees of the lease from proceeding with the alterations, and for damages to the reversion. The defendants in the latter action obtained ex parte leave to defend the action of *Rose* v. *Spicer*, and in both actions applied to be relieved from the forfeiture, and the plaintiff in *Rose* v. *Spicer* appealed from the order allowing the defendants Hyman et al. to intervene in that action. The Master, who heard the applications, refused to rescind the order allowing the defendants in *Rose* v. *Hyman* to intervene in the action of *Rose* v. *Spicer*, but made no order as to the relief from forfeiture, but without prejudice to any application for relief to the judge at the trial, and directed the two actions to be tried together. Ridley, J., on appeal by the plaintiff struck out the appearance of the defendants Hyman et al. in *Rose* v. *Spicer*, and dismissed the defendants, Hyman et al.'s, appeal from the refusal to grant relief from the forfeiture. In *Rose* v. *Hyman* Horridge, J., granted the plaintiff an interlocutory injunction against the continuance of the structural alterations, and an appeal was brought from both these orders of Ridley and Horridge, JJ. The Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.) were not unanimous, but the majority (Cozens-Hardy, M.R., and Moulton, L.J.) were of the opinion that the removal of the fence and the opening of a new doorway were breaches of the covenant to repair and keep in repair, and that no relief against the forfeiture could be granted except upon the terms of the restoration of the premises to their former condition. Buckley, L.J., on the other hand, was of the opinion that the assignees of the lease might, without breach of the covenant make such alterations as were necessary for carrying on the business of a theatre, and especially as the assignees offered to deposit in court a sum sufficient to restore the premises to their original condition, at the expiration of the term, and to provide against any public right being acquired by reason of the removal of the fence. In the result both appeals were dismissed, the defendants having refused to accept the terms on which alone the majority of the court considered relief from the forfeiture could be granted.

FISHERY ACT—"USING NET FOR CATCHING SALMON"—NET READY TO BE USED BUT NOT ACTUALLY USED.

Moses v. *Raywood* (1911) 2 K.B. 271. This was a prosecution for breach of a Fishery Act, forbidding the use of nets to catch salmon without having a license. The evidence shewed that the defendant was in a boat with another man in a river in a fishery district where salmon were usually caught, and that he got out of the boat and walked near the edge of the river looking for salmon. That he had in the boat a net resembling a landing net, and when interrupted by the water bailiff, the net was dry and had not been used. On a case stated by the justices who dismissed the information, a Divisional Court (Lord Alverstone, C.J., and Ridley and Channel, JJ.) held that the defendant ought to be convicted, as he had begun to search for salmon and had the net ready for use, and was therefore "using" the net within the meaning of the section.

WARRANT OF ARREST—"TRAVELLING TO EXECUTE WARRANT"—MILEAGE.

In re Cropley (1911) 2 K.B. 309. In this case Phillimore, J., decided that a warrant of arrest of a person is not completely executed until the person is lodged in the prison named in the warrant, and therefore that a bailiff executing such a warrant is entitled to mileage to the place of arrest, but also from the place of arrest to the prison.

JUSTICE OF THE PEACE—OUSTER OF JURISDICTION—BONA FIDE CLAIM OF RIGHT—TRESPASS—CLAIM THAT LAND IN QUESTION WAS A HIGHWAY—RAILWAY—DEDICATION OF HIGHWAY.

Arnold v. *Morgan* (1911) 2 K.B. 314. This was a case stated by magistrates. The defendant was accused of trespassing on a railway in such a manner as to expose himself to danger. The defendant alleged that he was lawfully on the railway in exercise of a right which he claimed as one of the public to pass upon the railway as upon a highway dedicated by the railway company or another company with which it had been amalgamated. The Divisional Court (Ridley, Pickford and Hamilton, JJ.) held that the jurisdiction of the justices was ousted, because a railway like any other public body may dedicate a highway over land vested in it by statute, provided the dedication is not incompatible with the object prescribed by the statute, and that the question

of compatibility is not triable by justices, nor is the question whether a highway dedicated before the passing of a statute has been subsequently extinguished thereby.

CONTRACT—CONSIDERATION—MUTUAL AGREEMENT OF CREDITORS TO FOREGO CLAIMS—DEBTOR PARTY TO AGREEMENT BY CREDITORS TO FOREGO CLAIMS—RIGHT OF DEBTOR TO SET UP AGREEMENT.

West Yorkshire Daracq v. *Coleridge* (1911) 2 K.B. 326 is a case which does not appear to have been previously covered by authority, although the point in question seems to be one which must have previously arisen. The directors of a company in liquidation by mutual agreement to which the liquidator was also a party, agreed to forego their claims for directors' fees. The company subsequently brought the present action against one of the directors for work done, and in this action the defendant set up a cross-claim for his fees as a director, and the question was whether the company were entitled to set up the agreement to forego the claim for fees. No consideration for the agreement was given by the company, but it was held by Horridge, J., that as the company, represented by the liquidator, was a party to the agreement, it was entitled to the benefit of the consideration proceeding from the other directors, and was therefore entitled to set up the agreement as a bar to the defendants' claim.

ACCORD AND SATISFACTION—SUM LESS THAN AMOUNT DUE, OFFERED BY THIRD PARTY IN SATISFACTION OF DEBT OF ANOTHER—ACCEPTANCE BY CREDITOR—EXTINCTION OF DEBT.

Hirachand v. *Temple* (1911) 2 K.B. 330. This was an action on a promissory note made by the defendant, to which the defendant set up as a defence that his father had offered to the plaintiff a sum of money less than the amount due in satisfaction, and the plaintiffs had accepted the sum offered. The money was remitted by draft, which the plaintiffs cashed, and retained the proceeds, and now sued for the balance of the debt. Scrutton, J., held that the facts above mentioned constituted no defence, but the Court of Appeal (Williams, Moulton and Farwell, L.JJ.) held that by cashing the draft and retaining the proceeds, the plaintiffs must be held to have accepted the money on the terms on which it was offered, and therefore that the debt was extin-

guished. Williams, L.J., considers that although the defendant could not set up the facts as an accord and satisfaction, yet that he was entitled to say that they amounted to an extinction of the note, just as effectually as if his name had been erased from it; and on the other hand from an equitable point of view the plaintiff could have no claim to the balance except as trustee for the father, and the correspondence produced shewed that the father never intended to make any claim therefor; and, further, that it would be a fraud on the father, who had paid part of the debt in discharge of the whole, if the creditor were thereafter to sue the debtor.

DEED—ASSIGNMENT OF LEASE—DELIVERY OF DEED NOT TO TAKE EFFECT TILL DEATH OF GRANTOR—ESCROW—TESTAMENTARY DOCUMENT.

Foundling Hospital v. *Crane* (1911) 2 K.B. 367. This was an action for rent against the executors of a deceased lessee. The defendants pleaded that prior to his death the lessee had assigned the lease to a Mrs. Browne, and that they had never entered into possession of the demised premises or claimed any interest therein. The evidence shewed that the defendant's testator, Hoe, being in possession, about the year 1905 executed an assignment of the lease in favour of Mrs. Browne, which he left with his solicitors with instructions that they were to be at liberty to fill in the date so that it might take effect on his death in case Mrs. Browne survived him. He died 22 Sept., 1909, and Mrs. Browne having survived him, the solicitors, after his death, filled in the date 20 September, 1909, as the date of the deed. The testator had been in possession up to the date of his death and retained the title deeds and paid the rates and taxes. Scrutton, J., who tried the action, with some doubt gave judgment in favour of the defendants, thinking the assignment had been validly delivered as an escrow; but the Court of Appeal (Williams, Farwell, and Kennedy, L.JJ.) held that inasmuch as the deed was not to take effect until the testator's death, it was in the nature of a testamentary document, which failed of effect, not having been executed in accordance with the requirement of the Wills Act, and could not be regarded as a deed inter vivos, notwithstanding the fact that Mrs. Browne had also executed it. The defence, therefore, failed.

INSURANCE—SHIP—DAMAGE TO HULL—LATENT DEFECT EXISTING PRIOR TO INSURANCE—COSTS OF REPLACING STERN FRAME OWING TO LATENT DEFECT.

Hutchins v. *Royal Exchange Assurance Corporation* (1911) 2 K.B. 398 was an action on a policy of marine insurance which contained what is known as the Inchmaree clause, providing that the policy should cover loss or damage to the hull through any latent defect in the hull. At the time the insurance was effected there was an unknown latent defect in the stern frame, which defect during the currency of the policy was discovered, and a new stern frame had to be substituted, and the question in the action was whether the cost of the new stern frame was a loss recoverable under the policy. Scrutton, J., who tried the action came to the conclusion that under the Inchmaree clause the loss recoverable is (1) actual total loss of part of the hull or machinery, through a latent defect coming into existence and causing the loss during the currency of the policy; (2) constructive total loss under the same circumstances, as where part of the hull survives, but is, by reason of the latent defect, of no value and cannot be profitably repaired, and (3) damage to other parts of the hull happening during the currency of the policy, through a latent defect, even if the latter came into existence before the policy. But he held that the pre-existing latent defect is not itself damage for which indemnity is recoverable, even if by wear and tear it first becomes visible during the currency of the policy. The action was, therefore, dismissed, and the Court of Appeal (Williams, Moulton, and Farwell, L.JJ.) affirmed the decision.

COUNTY COURT—REMOVAL OF ACTION FROM COUNTY COURT TO HIGH COURT—DISCRETION OF JUDGE—(ONT. JUD. ACT, S. 93(1))—COSTS.

In *Donkin* v. *Pearson* (1911) 2 K.B. 412, the defendants applied to remove the action from the County Court to the High Court. The Master made the order on the terms that the defendants should in any event pay the difference between the costs of the County Court and High Court. Horridge, J., reversed the order, but gave leave to appeal. The action was by a member of a trade union against the union, and the defence raised a difficult question of law, and the Divisional Court (Lord Alverstone, C.J., and Bray, and Coleridge, JJ.) held that that

was a sufficient ground for making the order, and notwithstanding the order of Horridge, J., was discretionary, reversed it, and restored the order of the Master.

ATTACHMENT OF DEBTS—GARNISHEE PROCEEDINGS—JUDGMENT PAYABLE AT FUTURE DAY.

In *White* v. *Stennings* (1911) 2 K.B. 418 the plaintiffs recovered a judgment payable at a future day; before that day had arrived, they commenced proceedings to attach a debt due to the defendant. The defendant applied to discharge the attaching order and summons, and the County Court judge refused the application, the defendant then appealed to a Divisional Court (Ridley and Channel, JJ.) who dismissed the appeal; but the Court of Appeal (Williams, Farwell, and Kennedy, L.JJ.) were unanimously of opinion that the attachment proceedings were premature and set them aside.

COUNTY COURT—DEPUTY JUDGE—CONSENT OF PARTIES—COUNTY COURTS ACT (10 EDW. VII. C. 30, ONT.) S. 4—APPEAL.

McInally v. *Blackledge* (1911) 2 K.B. 432. By the English County Courts Act, a County Court judge is empowered in case of unavoidable absence or illness to appoint as his deputy a barrister of not less than seven years' standing (see 10 Edw. VII. c. 30, s. 4, Ont.). A judge, with the consent of the parties, appointed the registrar of the court, who was not a barrister of seven years' standing, to act as his deputy, and it was held by a Divisional Court (Phillimore and Horridge, JJ.) that there was no jurisdiction, even with consent of parties, to appoint any one as deputy who did not fulfil the statutory requirements, and therefore no appeal lay from the registrar's decision.

MASTER AND SERVANT—DOMESTIC SERVANT—DETERMINATION OF SERVICE—CUSTOM—NOTICE GIVEN DURING FIRST FORTNIGHT—DETERMINATION OF EMPLOYMENT AT THE END OF FIRST MONTH—SERVANT LEAVING IN BREACH OF CONTRACT—WAGES.

George v. *Davies* (1911) 2 K.B. 445. This is an addition to the case law on the subject of domestic servants. The plaintiff, a domestic servant, entered the defendant's service on November 3, 1910, at yearly wages, payable monthly, there being no express agreement as to notice. On November 17, 1910, she gave notice

of her intention to leave at the expiration of the first month's service. She accordingly left, and the defendant refused to pay her wages on the ground that she had left without giving a month's notice. She brought an action in the County Court to recover the month's wages, alleging a custom that in the absence of agreement to the contrary either party was at liberty to terminate the service at the end of the first month on giving a fortnight's notice. The plaintiff called no evidence to prove the custom, but the judge said he had taken judicial notice of the custom in other cases and would do so in this case, and gave judgment for the plaintiff. A Divisional Court (Bray, and Coleridge, JJ.) held that the judge was entitled to take judicial notice of the custom, and that, apart from the custom, and even if the plaintiff wrongfully quitted service without proper notice, she was, nevertheless, entitled to recover the month's wages, which had accrued due to her.

PUBLIC OFFICE—OBLIGATION OF APPOINTEE TO PUBLIC OFFICE TO SERVE—COMMITTEE OF MUNICIPAL COUNCIL—POWER OF MEMBER OF COMMITTEE TO RESIGN.

The King v. *Sunderland* (1911) 2 K.B. 458 was an application for a mandamus to a municipal corporation to compel it to elect a person as a member of a committee appointed by the council, in place of a member who had been appointed and resigned. The contention of the municipality was, that the membership of the committee (the appointment of which was authorized by statute), was a public office, and that the person appointed to it was bound to serve, and that his resignation against the will of the council was therefore null and void; but the Divisional Court (Lord Alverstone, C.J., and Bray, J.), held that the membership of such a committee is not an independent public office, which according to the rule of the common law cannot be resigned against the will of the council; the application therefore to compel the filling of the vacancy caused by the resignation was therefore granted.

RESTRICTIVE COVENANT—PURCHASER FOR VALUE WITHOUT NOTICE OF RESTRICTIVE COVENANT—SUBSEQUENT PURCHASER WITH NOTICE.

In *Wilkes* v. *Spooner* (1911) 2 K.B. 473, the Court of Appeal (Williams, Moulton, and Farwell, L.JJ.), overruling Scrutton, J., held that where a person purchases land for value

without notice of a prior restrictive covenant affecting it, he is not bound by the covenant, nor is a purchaser from him, even though such purchaser may have actual, or constructive, notice of the covenant. There are, it is conceded, exceptions to the rule, which would prevent persons taking advantage of their own wrong, as, for example, a trustee in breach of trust selling trust property to a bona fide purchaser without notice, cannot himself buy it back so as to hold the property freed from the trust.

SOLICITOR AND CLIENT—MANAGING CLERK—PRINCIPAL AND AGENT—FRAUD OF AGENT—LIABILITY OF PRINCIPAL.

Lloyd v. *Grace* (1911) 2 K.B. 489 was happily a somewhat unusual case. The plaintiff went to the office of the defendant, a solicitor, to consult about her investments, and there conferred with the managing clerk, and on his advice and suggestion handed to him the title deeds of certain freehold property, and also a mortgage on land, and she also executed in favour of the clerk a conveyance of the freehold and an assignment of the mortgage. The clerk deposited the title deeds as security for an advance to himself which he retained for his own use, and he also called in the mortgage and misappropriated the proceeds. The plaintiff claimed that the defendant as the employer of the fraudulent clerk was bound to make good the losses she had sustained by his fraud. Scrutton, J., who tried the action gave judgment in favour of the plaintiff, but the majority of the Court of Appeal (Farwell and Kennedy, L.JJ.), allowed the appeal, on the ground that the clerk's taking in his own name a conveyance of the land and a transfer of the mortgage was not acting within the scope of his authority as managing clerk, and therefore the defendant was not liable for his acts. Williams, L.J., was for granting a new trial, not being satisfied, that there was not some evidence of such a holding out by the defendant of the clerk as being authorized to act on his own behalf, as would estop him from denying the authority of the clerk to take transfers of the plaintiff's property. The case shews the difficulty in the way of a client consulting a solicitor. He goes to one solicitor and is advised by the person apparently in charge of the business to do a certain thing, but before he does it, he ought to go to another solicitor to find out how far he will be justified in acting on the advice he has received. This might go on *ad infinitum*. Fortunately cases of this

kind are rare, but the decision does not appear to be altogether satisfactory, but whichever way it was determined, it was bound to involve a hardship on an innocent person.

PRACTICE—FOREIGN CORPORATION—CARRYING ON BUSINESS WITHIN THE JURISDICTION—SERVICE OF WRIT WITHIN THE JURISDICTION—AGENT'S OFFICE—HEAD OFFICER—RULE 55—(ONT. RULE 147).

Saccharin Corporation v. *Chemische Fabrik & Co.* (1911) 2 K.B. 516. In this case the defendants were a foreign corporation, having a sole agent for the United Kingdom, who rented an office in London, and was paid by commission on orders obtained by him for the defendants' goods. The agent had also authority to enter into contracts for sale on the defendants' behalf, without first transmitting them to the defendants. Deliveries of goods sold by the agent were made out of goods of defendant lying at wharves in London, and in other cases out of a stock of defendants' goods kept at the agent's office. Goods so delivered were paid for by cheques sent to the agent. In these circumstances the Court of Appeal (Williams, Moulton, and Farwell, L.JJ.), held that the defendants were carrying on business within the jurisdiction, and a writ of summons served on the London agent was a good service on the defendants, he being for the purposes of service a head officer of the defendants; and the decision of Bray, J., to the contrary was reversed.

PRACTICE—DISCOVERY—MALICIOUS PROSECUTION—INQUIRY AS TO INFORMATION ON WHICH DEFENDANT COMMENCED PROSECUTION.

Maass v. *Gas Light & Coke Co.* (1911) 2 K.B. 543, although involving merely a point of practice, was evidently regarded one of great importance inasmuch as no less than the entire Bench of the Court of Appeal sat to hear the appeal from the order of Ridley, J., disallowing certain interrogatories for the purpose of discovery. The action was for malicious prosecution of the plaintiff by the defendants for stealing gas, of which offence the plaintiff had been acquitted. The plaintiff delivered the following interrogatories for discovery. (4) What information, if any, had you that induced you to prosecute the plaintiff for stealing gas? What steps, if any, had you taken before commencing the prosecution to ascertain whether the charge was

true or not? What grounds, if any, had you for supposing that the plaintiff had committed the offence charged? Did you before you commenced the said prosecution take any and what precautions, or make any, and what inquiries, as to the truth of the said charge, and what was the result of each such inquiry? (5) What are the facts and circumstances on which you rely as shewing that you had reasonable and proper cause for the said prosecution? Both interrogatories were disallowed by the Master, and judge in Chambers, and the Court of Appeal (Cozens-Hardy, M.R., Williams, Moulton, Farwell, and Buckley, L.JJ., Kennedy, L.J., dissenting), held rightly so, and all but Kennedy, L.J., also held, that, in the absence of special circumstances, such an interrogatory as the 4th ought not to be allowed in an action for malicious prosecution, in which cases there were special reasons for caution in allowing interrogatories to be administered to a defendant, as, if defendants were compellable to disclose all information given, it might deter persons from doing their duty to the public in the prosecution of crime. Williams, L.J., expressed regret that there is not some rule making the decision of a judge in Chambers on such questions of discretion final.

SHERIFF'S FEES—EXECUTION—LIABILITY OF EXECUTION CREDITOR FOR SHERIFF'S FEES—"PERSON AT WHOSE INSTANCE SALE IS STOPPED"—STAY OF EXECUTION ON APPLICATION OF LIQUIDATOR.

Montague v. *Davies* (1911) 2 K.B. 595. By the English rules of court it is provided that in every case where an execution is withdrawn, satisfied, or stopped, the fees the sheriff is entitled to under the rule "shall be paid by the person issuing the execution, or the person at whose instance the sale is stopped, as the case may be." In this case the plaintiff issued an execution against the defendant company, which subsequently went into voluntary liquidation, and on the liquidator's application the sale under the execution was stopped. The execution creditor contended that the liquidator was bound to pay the sheriff's fees under the rule above referred to, but Bankes, J., held that the rule had not altered the common law liability of the execution creditor who had issued the execution, and that he was liable for the sheriff's fees and not the liquidator: and that "the person at whose instance the sale is stopped" refers to a trustee in bankruptcy, who under the Bankruptcy

Act may demand possession of goods taken in execution and thereby stop the sale.

SALE OF GOODS—GOODS NOT ACCORDING TO CONTRACT—RE-SALE BY PURCHASER—WARRANTY—CONDITION NEGATIVING WARRANTY.

In *Wallis* v. *Pratt* (1911) A.C. 394, the House of Lords (Lord Loreburn, L.C., and Lords Ashbourne, Alverstone, and Shaw), have reversed the decision of the Court of Appeal (1910) 2 K.B. 1003 (noted ante p. 101), for the reasons given by Moulton, L.J., who dissented from the judgment of the other members of the Court of Appeal, and held that the plaintiffs were entitled to recover damages consequent on defendant's breach of warranty, including the damages which the plaintiffs had been compelled to pay to third parties to whom they sold the goods in question.

CANADIAN RAILWAY ACT, 1906, S. 2, SUB-S. 11; S. 2, SUB-S. 28; S. 56, SUB-SS. 2, 3, 9; S. 238—RAILWAY BOARD—HIGHWAY—56 VICT. C. 48 (D.)—PREROGATIVE RIGHT TO GRANT SPECIAL LEAVE TO APPEAL.

Canadian Pacific Ry. v. *Toronto, and Grand Trunk Ry.* (1911) A.C. 461. This was an appeal to His Majesty in Council from a decision of the Supreme Court of Canada. In January, 1904, the Railway Committee of the Privy Council in London in the exercise of its powers preserved to it under s. 238 of the Railway Act (now R.S.C. c. 37), ordered the appellants and respondent railway to construct bridges over their lines of railway where they crossed Yonge street in the city of Toronto. Subsequently the Railway Board, which was instituted by the Railway Act of 1903, in June, 1909, ordered the appellant and respondent railways to construct a viaduct several miles long for the purpose of carrying their railways over, inter alia, Yonge street. The Supreme Court of Canada had upheld the order of the Railway Board. The appellants obtained special leave to appeal to His Majesty in Council, and on the opening of the appeal, counsel for the City of Toronto contended that no appeal lay, as under s. 56 (3) of the Railway Act, the decision of the Supreme Court is declared to be final. This point, however, was overruled, their Lordships holding that the statute does not do away with the prerogative right to grant special leave to appeal. On the merits their Lordships (Lord Loreburn, L.C., Macnaghten, Atkinson, Shaw, and Robson) agreed with the

Supreme Court, and dismissed the appeal, holding that the Railway Board had jurisdiction to make the order, which in effect superseded the prior order of the Railway Committee. They also held that 56 Vict. c. 48 (D.) is not a special Act conflicting with the Railway Act of 1906 as to the matter in question.

RIGHTS OF FISHING—CROWN GRANTS—LOTS ON OPPOSITE SIDE OF NAVIGABLE RIVER—SILENCE OF PATENT AS TO FISHING—EXCLUSIVE RIGHT OF CROWN TO FISHERY.

Wyatt v. *Attorney-General of Quebec* (1911) A.C. 489 was an appeal from the Supreme Court of Canada. The appellants were, under a patent from the Crown dated in June, 1883, grantees of the lots on either side of, and fronting on, the Moisie river in the Province of Quebec. This river, where it flows between the lots in question, is a navigable stream. The patent contained no grant of the right of fishing, but the appellants claimed the right as riparian proprietors. At the trial evidence was given as to negotiations between the grantee and the Crown prior to the issue of the patent, but the judge at the trial held that the negotiations did not contradict the clear language of the patent. The Court of Appeal, however, held that prior to the issuing of the patent there had been a concluded bargain between the grantee and the Crown, that the grantee was to have the right of fishing opposite the lots granted, and gave judgment against the Crown. The Supreme Court reversed this decision on the ground that the terms of the patent could not be altered, or added, or diminished, by any previous negotiations, written or oral, and that as the patent contained no grant of fishing rights the appellants were not entitled to any. The Judicial Committee of the Privy Council (Lords Macnaghten, Mersey, and Robson, and Sir A. Wilson) agreed with the Supreme Court and dismissed the appeal and this, notwithstanding that the appellants, since the date of the patent, had exercised the right of fishing, without interference by the officials of the Crown, or the Governor of Quebec who had considered they had the right so to do.

SALE OF RAILWAY TO A COMPANY BY PROMOTERS—PURCHASE AUTHORIZED BY INCORPORATING ACT—PROMOTERS THE ONLY SHAREHOLDERS—3 EDW. VII. c. 21 (D.)—4-5 EDW. VII. c. 158 (D.).

Attorney-General of Canada v. *Standard Trust Co.* (1911) A.C. 498. In this case the point in controversy was whether a

railway undertaking purchased by the promoters of a company of which they were the sole shareholders, could be legally sold by them to the company, its act of incorporation authorizing the purchase. The facts were that a syndicate of four persons procured a Quebec Act incorporating a railway company, $300,000 of the capital of which was taken up by the promoters, (and was all that had been issued), and they were, with others whom they had qualified, the directors of the company. The syndicate then purchased this railway undertaking, and sold it to another company which they had organized, for $648,000 which was paid for in part by the promoters getting credit for $300,000 on the shares subscribed by them, and the company acknowledged its indebtedness for the balance $348,000 to the said four persons in equal shares. This company, and another with which it had become amalgamated, became insolvent, and their railways were sold, and the promoters claimed to rank as creditors in respect of the $348,000 against the assets of the insolvent companies. The Judicial Committee of the Privy Council (Lords Haldane, Macnaghten, Mersey, and Robson) affirmed the judgment of the Supreme Court allowing the claim; their Lordships holding that the Act of incorporation authorized the purchase, and that it was not material whether or not the price was in fact excessive, as everyone interested in the capital of the company had concurred in the purchase, with full knowledge of all the circumstances.

EXPROPRIATION OF GAS COMPANY—SALE AND PURCHASE AS GOING CONCERN—STATUTORY POWER OF PURCHASE—BASIS FOR ESTIMATING PURCHASE MONEY.

Perth Gas Co. v. *Perth* (1911) A.C. 506. By an Act of the Western Australian Legislature the city of Perth was empowered to purchase all the lands, buildings, works, hereditaments, lamps, pipes, stocks, and appurtenances of and belonging to the appellants, upon giving to the directors six months' notice so to do, upon such terms and conditions as should be mutually agreed on between the directors and corporation, but in case of dispute the amount of the purchase money was to be determined by arbitration, and by the same Act the powers of the gas company were extended and, besides, the ordinary powers of gas companies, it was enabled to exercise its powers over a vast area of which the city of Perth constituted only a small portion, and no limit was placed on the amount of its profits. The Act also

confirmed the mortgages and securities already given by the company and made them a valid charge on its property and assets, and authorized the increase of its capital and the issue of debentures charged on its undertaking. The city of Perth having elected to purchase the undertaking, and arbitrators having been appointed to determine the amount of the purchase money, on a case stated by arbitrators, it was claimed on behalf of the city that the basis for determining the amount of the purchase money should be merely the value of the land and buildings, and the plant regarded as being in situ capable of earning a profit, and should not include the value of the company's statutory powers and privileges, or the amount of profits that had been or could be earned by means of the property or the exercise of its statutory powers. The Supreme Court of Australia gave effect to this contention; but the Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson, Mersey, and Robson) reversed that decision, and came to the conclusion that on the true construction of the Act, in the absence of any express provision to the contrary, it must be held to contemplate the sale and transfer, with the consent of the incumbrancers, of the whole undertaking as a going concern; and not merely the physical apparatus by which the business was carried on, but also the statutory powers, and that the value of the whole must be included in the calculation of the purchase money.

INSURANCE (MARINE)—NON-DISCLOSURE BY INSURER OF MATERIAL FACTS.

Thames & Mersey M.I. Co. v. *Gunford* (1911) A.C. 529. This was an action on a policy of marine insurance, the defence being that the policy was null and void owing to the non-disclosure by the insured of material facts: (1) that the master of the ship had not been at sea for twenty-two years, and that the last ship he had been master of had been lost and his certificate had been suspended, and (2) the existence of "honour policies" in favour of the managing owner for disbursements made on account of the ship. The Court of Sessions, Scotland, had held that the non-disclosure of these matters did not avoid the policy. The House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, Alverstone, Shaw, and Robson) agreed with the Court of Sessions (Lord Shaw, dubitante), that there was no duty on the part of the owners to inform the insurers

as to the past history of the master, and that the omission to disclose the facts of his previous career did not constitute the non-disclosure of a material circumstance; but they held that the non-disclosure of the existence of the "honour policies" which were effected on the basis that no further proof of loss should be required than the policy, and which constituted them in fact gaming or wagering policies, was a material fact, the non-disclosure of which avoided the policies, and the action therefore failed.

NUISANCE—HIGHWAY—DEFECTIVE RAILING—NUISANCE CAUSED BY TRESPASSER—ABSENCE OF KNOWLEDGE OF NUISANCE BY OWNER OF PREMISES—DUTY OF OWNER.

Barker v. *Herbert* (1911) 2 K.B. 633. This was an action brought to recover damages for an injury sustained by the plaintiff owing to a nuisance on the defendant's premises, in the following circumstances. The defendant was the owner of premises fronting on a public street, and in front of the house was an area protected by a railing, which had been rendered defective owing to boys playing football in the street. The plaintiff, a child, had passed through the opening made in the railing, and was clambering along inside the railing and while so doing fell into the area and was injured. The jury found that the gap in the fence constituted a nuisance, but that the defendant did not know of it, and that such a time had not elapsed since the rail had been removed, that he would have known of it if he had used reasonable care. On these findings the Court of Appeal (Williams, Moulton, and Farwell, L.JJ.) held that the plaintiff was not liable, the nuisance having been created by trespassers. The court was also of the opinion that the plaintiff's injuries were not due to the nuisance, as he had not fallen through the gap, but had gone safely through the gap in order to clamber along the inside of the railing.

REPORTS AND NOTES OF CASES

Province of Ontario.

HIGH COURT OF JUSTICE.

Falconbridge, C.J.K.B., Teetzel and Latchford, JJ.] [Aug. 23.

BARTLETT *v.* BARTLETT MINES, LIMITED.

Company—Director—Salary of, as officer of company—Resolution of director—Confirmation.

Appeal by defendants from the judgment of Sutherland, J., in favour of plaintiff in an action to recover salary as mineralogist for defendants. At the first meeting of the directors the plaintiff being also a director, a resolution was passed appointiug plaintiff as mineralogist at a certain salary. All the stock was held by these directors. At a shareholders' meeting held on the same day as the directors' meeting, the by-law of the directors was confirmed. It was contended by defendants that plaintiffs' appointment was not confirmed by by-law as required of s. 88, c. 34, 7 Edw. VII. (Ontario Companies Act) which enacts that "No by-law for the payment of the president or any director shall be valid or acted upon until the same has been confirmed at a general meeting."

Held, 1. The proper finding of fact should have been that the resolution appointing the plaintiff as mineralogist of the company, was not laid before the meeting of the directors, or approved by them.

2. The purpose of s. 88 is, that those who govern the company should not have had any power to pay themselves for their services without the shareholders' sanction. In this case, there was no by-law by the directors authorizing any payment to a director, except a by-law in reference to the president; and when the resolution appointing the plaintiff as a mineralogist was passed (he was not then a director) there was no resolution or by-law of the directors after he became a director authorizing payment to him during the time he was a director.

Mackenzie v. *Maple Mountain Mining Co.*, 20 O.L.R. 615, distinguished. In that case, the statute had been complied with, but

in the present case, there was no attempt to comply with its provisions.

J. W. Bain, K.C., and *M. Lockhart Gordon*, for defendants. *H. Cassels*, K.C., for the plaintiff.

Province of Manitoba.

KING'S BENCH.

Robson, J.] WOLFSON *v.* OLDFIELD. [June 27.

Fraud—Principal and agent—Real Property Act, R.S.M. 1902, *c.* 148, *ss.* 71 *and* 76.

Held, 1. It is a fraud sufficient to vitiate the sale for a real estate agent to lead the owner of land to confide in him as his agent, to get the best possible price for the property and to allow him to close a bargain on his behalf when, as a matter of fact, he, the agent, was at the same time acting as agent for the purchaser in an endeavour to get the property at as low a price as possible, without disclosing that fact to the owner.

2. The purchaser cannot under such circumstances, although ignorant of the fraud, be allowed to retain the benefit of the transaction procured by his agent. *Pearson* v. *Dublin Corporation* (1907), A.C. 351, followed.

3. Such conduct on the part of an agent is fraud within the meaning of that word as used in ss. 71, 76 of R.S.M. 1902, c. 148, and therefore the procuring by the purchaser of a certificate of title under that Act for the property would not prevent the vendor from having the sale set aside and the property ordered to be reconveyed to him upon payment of moneys received.

Phillips, Whitla, Dennistoun, K.C., *P. C. Locke, Hoskin*, and *Montague*, for the various parties.

Macdonald, J.] REX *v.* BARNES. [July 19.

Criminal law—Criminal Code, s. 778, *s.-s.* 2 *as re-enacted by* 8 & 9 *Edw. VII. c.* 9—*Summary trial—Offer of election made by magistrate's clerk for him—Warrant of commitment—Criminal Code, s.* 1121.

Held, 1. The offer of the magistrate to a prisoner of his right

to elect for a summary trial under s. 778 of Criminal Code may be made through the magistrate's clerk speaking for him. *Rex* v. *Ridehaugh*, 7 Can. Cr. Cas, 340, followed.

2. On the application of a prisoner undergoing sentence imposed by a police magistrate after conviction on summary trial of an indictable offence, on the ground that the warrant of commitment does not shew that the prisoner consented to be tried summarily, the judge may look at the conviction if it is before him, and, if the conviction shews such consent, s. 1121 of the Code applies and the warrant should be held good. *Reg.* v. *Sears*, 17 C.L.T. 124, distinguished.

Hagel, for prisoner. *Patterson*, K.C., D.A.-G., for the Crown.

Robson, J.] [August 2.

SHONDRA *v.* WINNIPEG ELECTRIC RY. CO.

Negligence—Findings of jury—Contributory negligence—Damages for personal injury.

In an action for damages for personal injury, caused by a car of the defendants, the jury found that defendant's negligence was the cause of the accident, but also, that the plaintiff might, by the exercise of reasonable care have avoided the accident. There was evidence sufficient to justify both these findings.

Held, 1, following *London Street Railway Co.* v. *Brown*, 31 S.C.R. 642, that the plaintiff could not recover.

2. When the law as to contributory negligence has been properly explained to the jury, it is not necessary for the judge to ask the jury in what respect the plaintiff omitted to take reasonable care.

Trueman and *Chapman*, for plaintiff. *Anderson*, K.C., and *Guy*, for defendants.

Mathers, C.J.] SMITH *v.* DUN. [August 7.

Libel—Mercantile agency reports to subscribers—Privilege—Publication of true extract from a public record.

Held, 1. The publication without malice by a mercantile agency to its subscribers of an extract from a register kept by virtue of an Act of a Provincial Legislature, which was open to

inspection by the public, for the purpose of giving to the subscribers information, which the agency bona fide believed to be true, is privileged, and an action for libel in respect of such publication will not lie, although the extract purported to shew that the plaintiff had given a chattel mortgage when it should have shewn only a lien note given on the purchase of chattels. *Fleming* v. *Newton*, 1 H.L.C. 363; *Searles* v. *Scarlett* (1892), 2 Q.B. 56, and *Annaly* v. *Trade Auxiliary Co.*, 26 L.R.Ir. 11, 394, followed. *Williams* v. *Smith*, 22 Q.B.D. 134, and *McIntosh* v. *Dun* (1908), A.C. 390, distinguished.

2. If what is published is not a true extract from the public record, even although it is furnished by the government official in charge, it is not privileged: *Reis* v. *Perry*, 64 L.J.Q.B. 566.

Hugg, for plaintiff. *Coyne*, for defendant.

Metcalfe, J.] [August 10.

WINNIPEG SATURDAY POST *v.* COUZENS.

Injunction—Breach of contract to accept and exclusively use plaintiff's goods.

A contract entered into by the proprietor of a country newspaper to accept and use exclusively every week the "ready prints" furnished by a publisher may be enforced by an injunction restraining the defendant during the period covered by it from using or publishing any ready prints except those published by the plaintiff, who should not be limited to the recovery of damages for the breach of the contract. *Metropolitan Electric Co.* v. *Ginder* (1901), 2 Ch. 799, followed; *Whitewood Chemical Co.* v. *Hardman* (1891), 2 Ch. distinguished.

Whitla and *Chandler*, for plaintiffs. *Durie* and *A. C. Ferguson*, for defendant.

Metcalfe, J.] MCNERNY *v.* FORRESTER. [August 23.

Negligence—Fall of wall of damaged building—Liability of owner for damages caused by—Burden of proof.

Held, 1. The owner of a high building which has been so damaged by fire, that the walls are in danger of falling, is not liable in all cases for the consequences of such falling, but is bound to take within a reasonable time very considerable pre-

cautions to prevent such falling when there are other buildings near enough to be damaged thereby; and, if a wall falls and damages have been caused to such other building, the onus is upon the owner to shew that he was not negligent in the matter.

2. Such onus is satisfied, however, by evidence convincing to the court, that the walls had been braced after the fire to such an extent that the architect of the building and the building inspector of the city, upon being consulted by the owner, in good faith advised him shortly before the accident that there was no danger of their falling, and that he in good faith acted upon such advice, although the result shewed that the experts consulted had been mistaken.

Phillips and *Whitla*, for plaintiffs. *Wilson*, K.C., and *Dysart*, for defendants.

Book Reviews.

The Law of Illegitimacy. By WILFRID HOOPER, LL.D. (Lond.). London: Sweet & Maxwell, Limited, 3 Chancery Lane. 1911.

The above was a thesis prepared and approved for the degree of Doctor of Laws in the University of London. The aim of the work is to describe the status of the bastard under English law both historically and as it at present exists. Illegitimacy can be treated from two aspects: (1) as an isolated status consisting principally of disabilities under which the bastard labours; and (2) as a branch of family law comprising the rights and obligations arising from the relation of parent and child. The author keeps this in view throughout the work which deals with the subject as follows: Part I., History of illegitimacy in mediæval law; Part II., Illegitimacy as a status in modern law; Part III., Proof of legitimacy and illegitimacy; Part IV., International law.

The style of the author is clear, scholarly and interesting, and the book is a distinct addition to every law library.

Canadian Criminal Procedure, as the same relates to summary conviction and summary trials; with an appendix of forms, compiled by Hon. T. MAYNE DALY, K.C., Police Magistrate. Toronto: Carswell & Co., Limited. 1911.

The first chapter gives a summary of the laws relating to the appointment of justices of the peace and police magistrates

and their powers. Chap. II. summarizes the Criminal Code and procedure thereunder, referring to some sections of the Code. Chap. III. deals with the jurisdiction of justices in general; Chap. IV. with responsibilities of justices and remedies against them; Chap. V. with information and complaints; Chap. VI. summary and warants of arrests in connection with indictable offences and summary convictions; Chap. VII. preliminary inquiries. Chap. VIII. refers to summary convictions, part XV. of Criminal Code; Chap. IX. to summary trial of indictable offences, part XVI. of Code. Chap. X. takes up the subject of habeas corpus and certiorari.

There would appear to be a great deal of valuable information in this book, but the trouble is to find it. This, of course, detracts from its usefulness, as practitioners have little time to read books through to find some isolated point. Readers also will look in vain for either a preface or a table of contents; nor does the introduction in Chap. I. give information as to the scope of the work. These defects should be remedied in a second edition.

Personalia.

The following Ontario lawyers were elected to Parliament at the recent elections; A. C. Boyce, K.C., T. W. Crothers, K.C., A. H. Clarke, K.C., W. S. Middlebro, K.C., E. Gus Porter, K.C., W. F. Nickle, K.C., E. N. Lewis, K.C., W. B. Northrup, K.C., Fred. Pardee, K.C., E. A. Lancaster, Samuel S. Sharpe, A. E. Fripp, K.C., J. H. Burnham, G. V. White, Hon. Charles Murphy, K.C., Haughton Lennox, K.C., W. H. Bennett, K.C., Edmund Bristol, K.C., A. C. Macdonell, K.C., W. M. German, K.C., Hugh Guthrie, K.C., E. M. Macdonald, of Pictou, N.S., and E. N. Rhodes, of Amherst, N.S., were also elected.

Judge L. W. Sicotte, for many years Clerk of the Crown at Montreal, died decently.

A. Edmund Tulk, barrister, Vancouver, has established himself in exceptionally fine offices in the Canada Life Building in that city.

Flotsam and Jetsam.

ABERRATIONS OF COLOUR SENSE IN WITNESS.—In a lecture at Boston, March 4, before the Society of Arts, Prof. Edmund Beecher Wilson of the department of biology at Columbia University declared that eight times as many men are colour blind as women, and that a man may inherit colour blindness from one of his parents, but it takes two to transmit it to a daughter. The New International Encyclopædia says colour blindness is found in from three to four per cent. of men and less than one per cent. of women. "The most common forms of colour blindness are red blindness, green blindness, and red-green blindness." A variety of defects of vision, in respect of the colour sense, apparently afflicted many witnesses in *Tillson* v. *Maine Cent. R. Co.*, 102 Me. 463, 67 Atl. Rep. 407, and it is rather remarkable that none of them seems to have been subjected to the infallible tests now in vogue with the New York Central and some other great railroad companies. In the case cited a semaphore with convex lenses on its four sides, red glass on two opposite sides and green glass on the other two opposite sides, was set near a railroad track and for more than a score of years, as far as known, had faithfully performed its office of sending red rays, *and only red rays*, directly down the track as a signal of danger when it was set for the red. On the night of an accident when the plaintiff, a fireman on defendant's train, was injured by reason of the engineer running past the semaphore, it was conceded, and even alleged in the plaintiff's declaration, that the device was properly set for danger, but it was averred that the device was so negligently located that at some points in front of it the green light was shown, or both red and green. But the singular fact was that ten witnesses for the plaintiff had tested the contrivanee since the accident, and six of them swore that the light when set for red shewed such a mixture of red and green that it was not practicable to distinguish the signal intended, while four of them declared that it displayed clear green. Several of these witnesses were experienced engineers. Fifteen witnesses for the defendant, having made similar tests, declared that when the apparatus was set for red, nothing but red was visible down the track. The court did not attempt to reconcile this conflict in testimony, but simply applied the familiar "physical facts" rule as follows:—

"Whatever variations there may appear to be in the testimony of witnesses who saw the same light set at the same

angle and shedding its light under the same conditions, there are immutable laws of physical science that cannot be disturbed by human testimony. Light, from whatever source emanating, must always traverse unobstructed space in direct lines, and, according to familiar principles in optics, rays of light falling upon a convex lens are conveyed into a narrow and intense beam. In this case the evidence is unquestioned that the rays of light emitted through the double convex lens of the semaphore lantern were so converged that the angle of refraction was less than fifteen degrees from a parallel line; whereas, without this lens, the rays would have been dispersed at an angle of about sixty degrees. Hence it would be impossible that the same light, adjusted at the same angle, should exhibit clear red to one observer, clear green to another, and a mixture of red and green to a third, under precisely the same conditions. Testimony given in direct contravention of physical laws is necessarily deemed incredible."—*Exch.*

A POETICAL LAW REPORT.

Once in a while judges will "drop into poetry," either original or quoted, and the books are full of quotations from the Bible, Shakespeare, and other classic texts; but the only case written in verse appearing in the law reports of this country is that of *State of Kansas* v. *Lewis*, 19 Kansas, 266.

IN THE SUPREME COURT OF KANSAS.

GEORGE LEWIS, Appellant, *vs.* THE STATE OF KANSAS, Appellee.

Statement of the Case by the Reporter:

This defendant, while at large,
Was arrested on a charge
Of burglarious intent,
And direct to jail he went.
But he somehow felt misused,
And through prison walls he oozed,
And in some unheard-of shape
He effected his escape.

Mark you, now: Again the law
On defendant placed its paw,
Like a hand of iron mail,
And resocked him into jail—
Which said jail, while so corraled,
He by sockage tenure held.

Then the court met, and they tried
Lewis up and down each side;
On the good old-fashioned plan;
But the jury cleared the man.

Now, *you* think that this strange case
Ends at just about this place.
Nay, not so. Again the law
On defendant placed its paw—
This time takes him round the cape
For effecting an escape;
He, unable to give bail,
Goes reluctantly to jail.

Lewis tried for this last act,
Makes a special plea of fact:
"Wrongly did they me arrest,
"As my trial did attest,
"And while rightfully at large,
"Taken on a wrongful charge.
"I took back from them what they
"From me wrongly took away."

When this special plea was heard,
Thereupon the State demurred.

The defendant then was pained
When the Court was heard to say
In a cold impassioned way—
"The demurrer is sustained."

Back to jail did Lewis go,
But as liberty was dear,
He appeals and now is here
To reverse the Court below.
The opinion will contain
All the statements that remain.

Argument and Brief of Appellant:

As a matter, sir, of fact,
Who was injured by our act,
Any property, or man?—
Point it out, sir, if you can.

Can you seize us when at large
On a baseless, trumped-up charge;
And if we escape, then say

It is *crime* to get away—
When we rightfully regained
What was wrongfully obtained?

Please-the-court, sir, what is crime?
What is right, and what is wrong?
Is our freedom but a song—
Or the subject of a rhyme?

Argument and Brief of Attorney for the State:

When the State, that is to say,
We take liberty away—
When the pad-lock and the hasp
Leaves one helpless in our grasp,
It's unlawful then that he
Even *dreams* of liberty—
Wicked dreams that may in time
Grow and ripen into *crime*—
Crimes of dark and damning shape;
Then, if he perchance escape,
Evermore remorse will roll
O'er his shattered sin-sick soul.

Please the Court, sir, how can we
Manage people who get free?

Reply of Appellant:

Please the Court, sir, if it's *sin*,
Where does *turpitude* begin?

Opinion of the Court. Per Curiam:

We—Don't—Make—Law. We are bound
To interpret it as found.

The defendant broke away;
When arrested he should stay.

This appeal can't be maintained,
For the record does not show
Error in the court below,
And we nothing can infer.
Let the judgment be sustained—
All the justices concur.

—*West Publishing Co. Docket.*

EXPERT EVIDENCE.—The ever present subject of expert evidence recalls an incident of some years ago, when a well-known Irish barrister began his cross-examination of a hand-writing expert with the question, "Where is the dog?" On the witness asking, "What dog?" the counsel replied, "The dog which the judge at the last assizes said he would not hang on your evidence."

"Rufus, you old loafer, do you think it's right to leave your wife at the washtub while you pass your time fishing?"

"Yes, sah, Jedge, it's all right. Mah wife don' need no watchin.' She'll sholy wuk jes' as hard as if I was dah."

Here is another old chestnut: "Mr. Justice Ridley once startled a witness who was appearing in a case tried before him. Some question had arisen as to whether the witness was speaking the truth or not, and the witness was naturally very indignant. 'I have been wedded to the truth from infancy!' he declared. 'Quite so,' agreed the judge; 'but the real question now is: How long have you been divorced?' "—*Law Notes.*

THE LIVING AGE (WEEKLY, BOSTON, MASS., U.S.A.).—The leading article in *The Living Age* for Sept. 2nd is "Morocco in liquidation," reprinted from *Blackwood's Magazine*. This gives an interesting account of the complications out of which the present dangerous situation has arisen. The strike of dock-hands and railway men in England has been settled for the present; but attention is drawn to the subject in an article in the above periodical of the same date on "British Merchant Seamen." This is timely, by reason of its presentation of the conditions which led up to the great labour war. The railway strike has since broken out in Ireland, which shews that there is still a very unsettled condition. The most serious aspect of it is that the strike question is not now so much a question of increased pay to the men, but as to whether the unions, which are now apparently socialist societies are to dictate terms not only to the railways, but also to manufacturers and others. "Punishment and Crime" is an article in the number of the *Living Age* for Sept. 16th, discussing in an illuminating way a problem of world-wide interests. The selections of this most interesting publication give a comprehensive grasp of the rapidly changing events of the day.

Canada Law Journal.

VOL. XLVII. TORONTO, OCTOBER 16. No. 20.

WHAT IS AN EX PARTE ORDER?

In *Broom* v. *Pepall*, 23 O.L.R. 630, on the application of the plaintiff, in the absence of the defendant, and without notice to him, an order was made by the Master in Chambers purporting to be made on the defendant's consent, but which did not in fact follow the consent. On the defendant becoming aware of the mistake in the order, he immediately applied to the Master in Chambers to rectify the order and the Master granted the application, but a Divisional Court has solemnly determined that this procedure was erroneous, that the Master had no power to correct the mistake, and the defendant's only remedy was by appeal, because it was said the order was made ex parte within the meaning of Rule 358. With great respect to the learned judges who arrived at that conclusion, we venture to think that it is not well founded. In Sweet's Dictionary the following explanation is given of the meaning of the term "Ex parte." "S. 1. In its primary sense 'ex parte' as applied to an application in a judicial proceeding means that it is made by a person who is not a party to the proceeding, but has an interest in the matter which entitles him to make the application. Thus, in a bankruptcy proceeding, or an administration action, an application by A.B., a creditor or the like, would be described as made 'ex parte A.B.,' that is, on the part of A.B. S. 2. In its more usual sense ex parte means that *an application is made by one party to a proceeding in the absence of the other.* Thus an ex parte injunction is one granted without the opposite party having had notice of the application. It would not be called ex parte, if he had proper notice of it, and chose not to appear to oppose it." This definition we think quite correctly lays down what is meant by the term, and it is the secondary meaning above given which

is applicable to the case of *Broom* v. *Pepall*. If the defendant had had notice of the application for the original order, and had failed to appear, then, it is true, the order would not have been ex parte; neither if the order made had followed the consent, could the order be said to have been ex parte, but where a party purporting to move on a consent, behind the back of the opposite party obtains an order not warranted by the consent, then such an order appears clearly to be ex parte within Mr. Sweet's definition.

We refer to the matter because it seems desirable that every facility should be given for the correction of orders improperly granted in such circumstances, such as is provided by Rule 358, but to substitute for the inexpensive and summary procedure of that Rule the more cumbrous and expensive machinery of an appeal seems to be rather unnecessary, to say the least of it.

FAIR WAGES CLAUSES IN CONTRACTS.

A stipulation is frequently made in contracts for public works and for public supplies that the workman shall be paid the trade union scale of wages, and that the customary hours of labour shall be observed. There has been, however, no standard form in which this stipulation could be expressed. A recent circular issued by the local Government Board in England embodies several clauses which have been generally adopted by contracting departments of the British Government pursuant to the recommendation of the Fair Wages Advisory Committee. These clauses will be found easily adaptable to Canadian conditions, and are as follows:—

1. (*Fair Wages Clause.*)—"The contractor shall pay rates of wages and observe hours of labour not less favourable than those commonly recognized by employers and trade societies (or, in the absence of such recognized wages and hours, those which in practice prevail amongst good employers) in the trade in the district where the work is carried out. Where there are no such wages and hours recognized or prevailing in the district those

recognized or prevailing in the nearest district in which the general industrial circumstances are similar shall be adopted. Further, the conditions of employment generally accepted in the district in the trade concerned shall be taken into account in considering how far the terms of the fair wages clauses are being observed. The contractor shall be prohibited from transferring or assigning, directly or indirectly, to any person or persons whatever, any portion of his contract without the written permission of the department. Sub-letting other than that which may be customary in the trade concerned, shall be prohibited. The contractor shall be responsible for the observance of the fair wages clauses by the sub-contractor."

2. (*Exhibition of notice at works.*)—"The contractor shall cause the preceding condition to be prominently exhibited for the information of his workpeople on the premises where work is being executed under the contract."

3. (*Inspection of wages books, etc.*)—"The contractor shall keep proper wages books and time sheets, shewing the wages paid and (so far as practicable) the time worked by the workpeople in his employ in and about the execution of the contract, and such wages books and time sheets shall be produced whenever required for the inspection of any officer authorized by the department. (Specify the department.)"

4. (*Factory clause for inclusion in contracts in certain trades.*)—"All work executed under the contract shall be carried out at the contractor's own factory or workshop at or other place approved by the department (specify the department), and no work under the contract shall be done in the homes of the work people."

5. (*Direct payment of wages, for inclusion in contracts in certain trades.*)—"All wages earned by workers engaged on work under the contract shall be paid directly to them and not through a foreman or others supervising or taking part in the operations on which the workers are engaged."

QUIETING TITLES ACT AND THE TORRENS SYSTEM.

The attempts made by these Acts to facilitate the conveyance of real property and to simplify titles are very praiseworthy and, in many cases are of great value. They would be more acceptable, however, to the profession if in their practical working out there was more elasticity, and their machinery less complicated. It would also be well if there were more facilities than there are in some of the offices for doing business, and doing it more speedily.

One of our correspondents whose opinion is of value, sends us a communication on the subject which we give to our readers. We should be pleased to hear from others what their views are on the subject. His remarks are as follows:—

"In the year 1875 the title to a tract of land in West Toronto was quieted under the Quieting Titles Act at very considerable expense. Recently an application was made to quiet the title to two small lots which were part of this tract, and for the purpose of the application no less than sixty-three deeds had to be produced to establish the title—most of them were not in the petitioners' possession, and copies had to be procured from the registry office at very considerable expense. It is almost needless to say that the same difficulty would be found to attend the proof of many another lot included in the same tract, and yet this accumulation of deeds and difficulties in the proof of title was merely the result of the dealings with the land for the past 36 years. As time goes on and transactions take place with reference to land, the difficulties multiply, under the old system of land transfer, until at last the title is buried in such a heap of documents that it has either to be taken on trust, or it costs more to investigate the title and see if it is all right, than possibly the land may be worth.

"In 1885, the Land Titles Act was brought into force in the city of Toronto and the county of York, and if the land in question had been registered under that Act, the owner, instead of having a pile of deeds a foot high, would have had one single document, that anyone could understand, to prove his title.

"For some strange reason the public seem slow in adopting the Land Titles system of transfer, although anyone can see its superiority to the old system, which is bound to occasion difficulty sooner or later.

"Each owner under that system, if he thinks of the matter at all, probably hopes that the trouble and difficulty will not fall on his shoulders, but that he may be able to dispose of his property, as perhaps he himself acquired it, namely, to one so desirous of acquiring it that he will be willing to take risks. He may wake up some fine morning, however, and find a purchaser calling on him to prove his title, and then the trouble will begin, and by the time he has got through he may find himself out of pocket three or four hundred dollars."

CAPITAL PUNISHMENT.

We are indebted to a writer in *Nineteenth Century and After* for a luminous article on the subject of punishment and crime. We give our readers the benefit of his observations on the subject of capital punishment, which he deals with in a convincing manner, coming to the conclusion (a conclusion with which we fully agree) that it would not be in the interest of the public that it should be abolished.

The writer in the early part of his article works out four canons for the consideration of his subject, which he names in order of importance: (1) Segregation, (2) Deterrence, (3) Reformation, (4) Humanity, and then discusses how the various modes of punishment now in use conform to the requirements of these canons; and then proceeds:—

The extreme penalty of the law at present is capital punishment. Much controversy has been aroused about it in recent times, and the allegation is freely made that the death penalty is a relic of barbarism, and ought to be abolished. It is largely with a view to finding a psychological solution to this problem that I have undertaken the present article. The first requirement of punishment—segregation—is very effectively met by it. The

criminal, by losing his life, is finally removed from society, and all possibility of his committing any further injuries is withdrawn. The segregation, while thus more perfect than by any other mode, is brought about at low cost, and with little trouble to society. No cell has to be provided for his habitation, no warders told off to watch him, no work created for him. We are frequently told that murderers are often much less truly criminal than the majority of petty thieves and swindlers. Their crime was committed in a fit of passion, possibly with strong provocation; they have previously led blameless lives; and the suggestion is made that their punishment should be lighter, rather than heavier, than that of more vulgar offenders. The argument may have some weight in favour of lenient treatment while in prison; but the demands of segregation for such a man are fully as urgent as in the case of the most brutal ravisher or assassin. For a man who has once been carried away to such an extent by a fit of passion is very likely to be carried away a second time—more likely, indeed, for it is a well-known law of physiology that mental processes which have once occurred render the way easier for a recurrence. The danger to life from such a person is considerable, and he must be altogether removed from society. Capital punishment is the easiest and most certain method by which this can be effected.

I come now to my second canon—Deterrence. I am aware that it is often said that capital punishment does not truly act as a deterrent. I have noted also the coincidence that persons who make this statement are nearly always those who on grounds of humanity demand the abolition of capital punishment. The allegation, which thus bears on its face the appearance of being made to bolster up a case, may, I think, be conclusively refuted. Inductively, we have such facts as the recrudescence of assassination in France accompanying the suspension of the death penalty. A. Lacassagne, in his important book, "Peine de Mort," shews that homicides are rarest in those countries where capital punishment is most rigorously enforced. I do not want to press this, however, as the relation of cause and effect is proverbially difficult to trace in social affairs, and the

apparent connection may possibly be due to other conditions which remain obscure. I prefer to rely on syllogistic reasoning and the deductive method, which Mill represents in his Logic as the instrument of chief value in the study of social affairs. I have pointed out that the punishments inflicted by society are such as to afford adequate gratification to the vindictive sentiments against the criminal. The degree of punishment is proportionate to the strength of the resentment. Now, there is no question that capital punishment is more potent to gratify the public revenge than any other form of punishment now in use. It is (in full harmony with public opinion) confined to the most callous and cold-blooded murders, in which public animosity is roused to its fullest extent. It is *not* employed for minor crimes, in which vindictive feelings are less powerful; though even then, in such cases as the wholesale ruin of poor people by some fraudulent company-promoter exciting our high indignation, we often hear it said that the offender deserves to be hanged. The fact that capital punishment is only invoked to meet the highest flights of public resentment is an unequivocal proof that popular sentiment regards it as the most terrible of all punishments. Whether popular sentiment on this matter is well grounded or not, is another question. I shall shortly endeavour to shew that it is not; but in the meanwhile I am only concerned to note the attitude of popular sentiment, and to draw the obvious corollary that the punishment which popular sentiment regards as the most terrible is necessarily that which the public are most desirous to avoid, and therefore that which has the greatest deterrent effect.

The same conclusion may be drawn from the propaganda of the abolitionists themselves. Do they regard capital punishment as the most terrible of all penalties? If not, is it the case that they wish to abolish it for the purpose of instituting another punishment, such as prolonged imprisonment, which appears to them more terrible? They will hardly admit it. If, then, they advocate abolition, simply because capital punishment appears to them too horrible for our modern civilization, we may surely

infer that this is the punishment that they would themselves be least willing to face; and that is only another way of saying that it is the punishment which has the greatest deterrent effect.

Let me not be misunderstood, however. I do not mean to say that for all men, and at all times, capital punishment must of necessity be the strongest of all deterrents. Mankind are not all alike, and doubtless there are many who would much prefer to suffer the death penalty than a long term of imprisonment. Some months ago a gentleman wrote to the *Times* to say that it had often been his duty to notify to condemned criminals the fact that they had been reprieved. In one case he got the blunt answer, "Thank yer for nothing; I'd rather be hanged." Other cases of similar purport sometimes occur. But the good people who bring out these exceptional instances appear to think that a generalization may be founded upon them, and that capital punishment is shewn to have no deterrent force. Nothing could be more absurd. All that is shewn is the infinite variety of human nature, and that the same motives affect different people in different ways. We have to legislate, and to supply deterrent motives, not for exceptional people, but for the general run of humanity around us. And I have already proved that the general run of humanity is more likely to be deterred by capital punishment than by any other means open to us. Probably the exceptions are not really very numerous. When a prisoner is annoyed on hearing of his reprieve, everybody is startled and surprised, and the fact is considered worthy of being chronicled in the *Times*. I venture to hazard the opinion that the large majority of prisoners shew relief when they hear of their reprieve, and that no one would think this appearance of relief so remarkable as to call for a letter to the *Times*.

There is one further class of criminal to whom I must allude —the murderer by sudden impulse. Of him it may possibly be true that capital punishment is no deterrent; but it certainly is equally true that no other punishment would be any deterrent either. The impulsive murderer does not stop to think; he never reflects for a moment on any consequences of his action,

however appalling; he is borne away by a momentary passion, carrying before it all remnants of common sense or regard for the future. We have no reason for supposing that capital punishment would not be more likely to deter him than anything else. On the contrary, we must suppose that if he stopped to think for a moment, he would be more affected by a punishment which appeals so powerfully and vividly to the imagination than by one less striking but more prolonged. At all events, the discussion as to the relative efficiency, for deterrence, of various punishments, cannot be affected by the case of one who is momentarily blind and deaf to any future punishment whatever.

We arrive, then, at the conclusion that Deterrence is more effectively achieved by capital punishment than by any other method; and that it satisfies the requirements of our second canon as completely and thoroughly as I have previously shewn it does the first.

My third canon was Reformation of the criminal. Since capital punishment involves destruction of the criminal, there is no need to reform him, and the canon is irrelevant. Some naïve persons have suggested, indeed, that we ought to give the criminal time to reform and lead a better life, lest his soul should be eternally damned. To that I have two answers: (1) That it is not the business of the State to trouble itself as to what happens to the souls of the departed; its business is to regulate society for the benefit of the living. (2) That the height of a criminal's repentance is most likely to be reached shortly after he has been condemned to death, and the gravity of his offence thus strongly brought home to him. By executing him at this auspicious moment, he will be relieved of the danger of a moral relapse—alas! only too probable with human nature as it is—and his soul will in consequence be given the very best opportunity it is likely to have of getting into heaven.

The fourth canon—Humanity—brings me to the centre of the controversy that has raged round the whole subject. It is said that capital punishment is so horrible and barbarous that it

ought to find no place in modern civilization, and that no crime, however foul, can justify it. The support of it is no less purely one of sentiment, than the opposition to it is one of sentiment. In some minds compassion for the criminal is uppermost, while in other minds compassion for the victim and resentment against the criminal is uppermost. I shall now proceed to dismiss both sentiments from consideration, and to submit the humanitarian allegations to a dispassionate analysis. At the risk of being repellent, I shall seek to ensure dispassionateness by the employment of arithmetical symbols. These symbols must not be taken as accurate representations of the facts, but they serve to fix in our minds the leading points, which otherwise might evade us, with an accuracy as amply sufficient as the occasion calls for.

I have pointed out that the canon of Deterrence requires that the infliction of suffering should be a necessary part of all punishment. We may therefore compare two punishments by estimating the quantity of suffering inflicted by each. The alternative to capital punishment is penal servitude for life, or at all events for a very long period of years. We may therefore confine our comparison to these two punishments. Let us call the average daily quantity of suffering experienced by a convict in penal servitude one unit of suffering, or one penal unit; so that in the course of a year, a convict undergoes 365 penal units. Now let us analyze the state of mind of the man condemned to death. The punishment may be considered in two parts—first, the suffering experienced during the actual moment of execution; second, the sensations of terror and gloomy foreboding which presumably fill the period between the passing of the sentence and its consummation. Dealing first with the first part, it is agreed on all hands that death is practically painless, and, in addition, that the whole proceedings are exceedingly swift. From the moment that the executioner enters the condemned man's cell to the moment of death is stated to be not more than sixty seconds. The executioner, after binding the criminal, performs his work on the scaffold with lightning rapidity. The criminal himself appears often to be so dazed

as to be little capable of feeling the suffering with which he is credited. But however he may feel it, it seems undeniable that the most excruciating mental suffering that is over in sixty seconds can only be as a featherweight in the balance compared with the protracted agony of many years' penal servitude. I pass, therefore, to the more formidable side of capital punishment—the terrible anticipations of the last weeks of life. We have to compare one day of anticipation with one day of penal servitude, and endeavour to estimate by how much the agony of the former exceeds that of the latter. The waiting anticipation appeals so vividly to our minds, and is so forcibly realized, that we are apt to over-estimate its pain, in comparison with that of the less easily represented penal servitude. It seems probable that Fechner's laws of sensation may be applicable here. His theory states that sensation only increases in arithmetical progression when the stimulus increases in geometrical progression. Which, if we may draw the analogy, means that if a certain stimulus produces a certain quantity of pain, double that stimulus will produce very much less than double the quantity of pain. So that, when the pain has already reached a tolerably high level, it will require a very large increment of stimulus to produce a very small increment of pain. Now, the one penal unit per diem which accrues to the convict in penal servitude is already a fairly high degree of pain. To a refined person, it must be such a degree as is not susceptible of a very large increase under any stimulus. The stimulus of anticipated death is far from being the worst of human inflictions. There is no physical pain attached to it; nor have I ever heard of a criminal going off his head on account of it. As a doloriferous agency, therefore, it must be concluded that the prospect of death, though considerably greater, is not immeasurably greater, than the combined physical and mental sufferings of penal servitude. And the quantity of suffering actually felt would be, under Fechner's law, very much less than proportional to the increase of the doloriferous agency. Seeing how much suffering is included in the one penal unit of penal servitude, it seems rea-

sonable to suppose that anticipation of death would not be productive of more than two penal units, or double the amount of suffering. Much more than this could hardly be tolerated; yet we know that whatever suffering there is, *is* tolerated. Let me, however, place the case in the most unfavourable possible light for my own theory. Let me make the impossibly extravagant assumption that the criminal awaiting execution undergoes ten units of suffering per diem. Then of he has three weeks to wait, his total punishment is equal to 10 x 21, or 210 penal units. Suppose we allow for the minute of actual execution another ten units, the sum total of suffering is 220 units. This is equivalent to 220 days' penal servitude. So that, on the most favourable possible hypothesis the actual amount of suffering inflicted by capital punishment is less than that undergone in eight months of penal servitude!

That the conclusion here established will be accepted by sentimentalists at large I do not for a moment imagine. Sentiment can only be shaken by sentiment; it is not touched by logical analysis: the two terms are incommensurable. Arguing with sentimentalists is like writing on water; and I shall here content myself with protesting against their claim to monopolize humanitarianism. I defend capital punishment on the express ground of humanity. I affirm that those who wish to abolish it, in favour of penal servitude, are enemies to humanity, and that their success would cause a large increase of suffering to the very persons on whom they lavish their pity. In Italy the death penalty has been replaced by carcere duro, which is characterized by Lacassagne as "une peine atroce." The fundamental virtue in sentiment is its driving energy; its fundamental vice is that it excludes intellectual analysis, and is liable, with the highest and most sincere professions, to bring about evils that a calmer mind would have easily foreseen.

If capital punishment is in reality so humane, it must now be shewn why soft-hearted people protest so energetically against it. A false theory is more effectually demolished when the psychological grounds for its tenure have been exposed. The exist-

ence of the prejudice against capital punishment is due to the peculiarly vivid manner in which an execution appeals to the imagination — the very same element that constitutes it so strongly deterrent a force. We see the little whitewashed chamber, the trap-door and pit, the "ugly lever"; and we fancy to ourselves with terrible realism the moment when the condemned man, his head concealed in a white bag, is launched into eternity as the bolt is released. The horrid apparition grips the mind with a spastic clutch that paralyzes the intellectual faculties. The essence of sympathy is to feel some part of the pain which we pity in another; and accordingly much pain must be excited in sympathetic minds by so horrible a vision. The picking of oakum, the privation of liberty, etc., do not and cannot appeal in anything like so forcible a manner to our imaginations; we forget the bleeding fingers and fractured nails, the spirit broken down by hardships and indignities; and the long years cannot be grasped in our thoughts in any but a symbolical sense. And because the thought of capital punishment fills us with much pain, while the thought of penal servitude fills us with less pain, we assume that the realities have corresponding relations. The fallacy is one with which all students of metaphysics are abundantly familiar. What are only the laws of thought are taken to be the laws of things. Subjective relations are regarded as equivalent to objective relations; and the universe is whittled down to that evanescent appearance which can be contained in the brain of a human being.

Yet another psychological fallacy is involved. The refined and sensitive person who declaims against the death penalty is apt to assume that a murderer is a refined and sensitive person like himself. Cold-blooded murderers (and these alone are now hanged) have by the fact of their crime proved their callousness and lack of sensitiveness. Readers of Lombroso will not require to be informed of the almost incredible indifference to pain that criminals exhibit. Men will endeavour to commit suicide (and succeed) by driving large spikes into their own heads with a hammer; or by thrusting a white-hot iron rod some

inches into the abdomen. Dr. Quinton, in his interesting little book on Crime and Criminals, records an instance of a prisoner who, merely to spite his gaoler, smashed his own thumb by putting it into the hinge of a jointed table, and forcibly raising the flap. No one denies that criminals as a whole are characterized by an astonishing lack of sensibility, both physical and mental. Condemned men often spend their last night in comfortable sleep, and walk to the scaffold with no sign of trepidation. The fallacy of reading into others the same motives and feelings as animate ourselves is productive of endless mistakes in interpreting human character. The calmness of men on the point of execution has long bewildered the world, from the time of Plato onwards. We are, perhaps, less astonished at the coolness of Socrates, since we are apt to regard philosophers as somewhat inhuman. Montaigne was struck by the indifference of condemned men. I quote, with modernized spelling, from Florio's translation of the essay "That the taste of goods or evils doth greatly depend on the opinion we have of them:"—

One who was led to the gallows desired it might not be through such a street, for fear a merchant should set a sergeant on his back for an old debt. Another wished the hangman not to touch his throat, lest he should make him swoon with laughing, because he was so ticklish. Another answered his confessor, who promised him he should sup that night with our Saviour in heaven, "Go thither yourself to supper, for I am used to fast anights." Another upon the gibbet calling for drink, and the hangman drinking first, said he would not drink after him for fear he should take the pox of him. Every man hath heard the tale of the Piccard, who being upon the ladder ready to be thrown down, there was a wench presented unto him with this offer (as in some cases our law doth sometimes tolerate), that if he would marry her his life should be saved, who, after he had a while beheld her, and perceiving that she halted, said hastily, "*Away, away, good hangman, make an end of thy business: she limps.*" The like is reported of a man in Denmark, who, being adjudged to have his head cut off, and being upon

the scaffold, had the like condition offered him, but refused it because the wench offered him was jaw-fallen, long-cheeked, and sharp-nosed.

Humanitarians may rest easy that no one in this country will be required to pass through the ordeal of execution unless he has previously qualified as regards lack of sensitiveness by the commission of a brutal act that would have been impossible to a sensitive man.

To sum up: we have found that all our four canons of punishment—Segregation, Deterrence, Reformation, and Humanity—are met by capital punishment in an almost ideal manner, and that its removal from the statute book would be, from every point of view, a most profound and unfortunate mistake.

IS A "WIRELESS MESSAGE" WITHIN THE PROVISIONS OF CRIMINAL STATUTES RELATING TO TELEGRAPHS AND TELEPHONES?

1. It is not the province of a law journal, or of a legal editor, to take cognizance of every "point" a resourceful attorney may present, or of every question an ill-advised criminal prosecution may raise. But in those cases in which a great fundamental principle of the law is involved—especially where the exact point presented has not been passed upon or adjudciated by a court in any of the states of the Union, or any of the federal courts—a legal journal or a law editor is warranted in presenting the fundamental principles and authorities which do, or should, govern courts in arriving at a conclusion, even though they are somewhat elementary in their character.

2. The question whether a "message" sent by electric space-telegraphy, through the instrumentality of any of the various methods of sending what are popularly known as "wireless messages," is embraced within the provisions and prohibition of the ordinary criminal laws of a state relating to and governing telegraph and telephone lines, has been raised by an indictment re-

cently returned by a grand jury at Los Angeles, California. "under instruction," no doubt.

3. The occasion for this indictment, briefly, is as follows: For a number of years there have been in Los Angeles three five-cent morning papers all of the class known as of the "reactionary" type. Recently a one-cent morning paper, of the "progressive" type, was established there, resulting in a "war of types." One of the old papers published a scurrillous, not to say libellous, attack upon the owner and publisher of the new paper. The proprietor of another of the morning papers (who is said to own and control the third) telephoned to the editor of the third paper, suggesting that it reproduce the attack of paper number one. The editor of the third paper being on a vacation at Avalon, and out of the reach of telephone or messenger, the matter was communicated to him by "wireless" from the wireless station in the building of paper number one. This "message" was "taken" by a fifteen-year-old boy "operator," on a private wireless apparatus rigged up in his father's house. The new paper published the wireless message as taken by the boy operator. The genuineness of the message is not denied, and the accuracy of the "taking" is not questioned. The matter of the publication of this message in the new paper was laid before the grand jury, and an indictment returned under s. 619 of the California Penal Code, relating to telegraph and telephone messages, and making it a felony to wilfully disclose the contents of such a message without the permission of the person to whom addressed.

4. If there is any statute in that state which will justify or support this indictment it is found in s. 619 or s. 640 of the Penal Code of that state, which sections are in pari materia. Neither of these sections of the Penal Code specifically provides as to a "wireless message," and neither uses any word or words of equal import indicating any intention on the part of the legislature to include within the prohibition and punishment such a message. Such an intention can not be incorporated into these by statutes by inference and construction. By express pro-

vision of the California Penal Code, a criminal statute is to be "construed according to the fair import of the terms, and with a view to effect its object;" and, by the provisions of the Code of Civil Procedure of California; the court is prohibited from reading into the statute language or words not incorporated therein.

5. History and import of ss. 619 and 640. These sections of the California Penal Code were both enacted on February 14, 1872, and were both amended into their present form and provisions on March 21, 1905. When these sections were originally enacted they related solely to a mode of telegraphy and to a message which depended upon "conduction:" that is, upon the conveyance of an electric current by an unbroken metallic wire suspended or laid between two stations. As a matter of fact no other method of telegraphy was at that time known, or put into practice for more than a quarter of a century thereafter. These statutes having been enacted before such a thing as "wireless telegraphy," or a "wireless message," was known—or even dreamed of, unless it may have been in the privacy of the laboratory, by an eminent scientist here and there over the world—the courts, and officers of the judicial department, cannot presume that there was an intention on the part of the legislature to include within the prohibition and punishment provided in these sections a thing not known and not in existence at that time—a "wireless message." Telephones were not known at the time these sections were originally enacted; and it has always been conceded, on all hands, in California, as far as the criminal laws of the state are concerned (whatever may be the rule as to civil statutes), that telephony and telephonic messages were not embraced within the provisions of the original sections. As a matter of fact, these sections were amended on March 21, 1905, into their present form for the express purpose of making them cover telephony and telephonic messages. The amendment to s. 619 consists simply in the insertion of the words "or telephonic" after the word "telegraphic," and before the word "message;" and the amendment to s. 640 consists simply in the insertion of

the words "or telephone" before the word "line," and also before the word "office." This shews beyond the possibility of question, or of a remote doubt, that there was no intention on the part of the legislature to so amend these sections as to make them embrace "wireless telegraphy" and "wireless messages." To bring "wireless messages" within the provisions of the criminal statutes, it is thought, it will be absolutely necessary to do so in express terms.

6. A "wireless message" is a thing apart, both from a telegraphic message and a telephonic message. It differs as much from each as they differ from each other; and telephonic messages had to be especially provided for by specific amendment to bring them within the operation of the statute.

7. The word "telegraph" is derived from a Greek word which means, literally, afar writing, or to write afar; and, as known to the law, refers to the entire system of appliances used in the transmission of telegraphic messages by electricity, consisting of, first, a battery or other source of electric power; secondly, of a line, wire, or other artificial conductor for conveying the electric current from one station to another; thirdly, of the apparatus for transmitting, interpreting and reversing the electrical current; and, lastly, of the indicator or signalling instrument; and courts take judicial notice that the "telegraph" of a railroad company consists of wires strung on poles set upright in the ground along its road.

These sections of the California Penal Code, as enacted in 1872, embrace the words "telegraphic message" and "telegraph line," shewing unmistakably that the only thing the legislature had in mind at the time of their message was the "conduction" method spoken of above; and the amendments to the original section simply introduce the words "telephonic" and "telephone," leaving the original sections, in purpose, absolutely as they were enacted, except their extension so as to include telephone lines and telephone messages—both of which are operated through and depend upon a wire "conduction." These two sections of the California Penal Code, being in pari materia, are

to be constructed together, and so construed there can be no doubt or question but that "conduction" was the only method of transmission in the contemplation of the legislature.

8. The sole object of these sections of the California Penal Code, when enacted, and as amended, was and is to prevent the employees of telegraph and telephone lines and offices from giving out to other than the addressee, or making a private use of messages sent and received; and also to prevent persons not employees from getting possession of the contents of messages and information not intended for and not delivered to them; that is, by the means popularly known as "wire-tapping." To accomplish or perpetrate the offence of wire-tapping there must be an overt act of invasion, a trespass, upon the rights and property—the line—of the company. No telegraph or telephone company, or other company, can have either a "right of way" or "private property" in the air. "Usque ad ocrum, et usque ad coelum," is a venerable maxim of the law. Hence, any one who goes onto a house-top and there shouts his private business into the air, which is common to and the property of all men, takes the chance of having his "shout" overheard by anyone whose premises the sound-wave passes; and if he is injured thereby, he has but himself to blame; it is damnum absque injuria. And this rule holds good, no matter in what "language" the "shout" is uttered.

9. Elementary rules of construction. The conditions which justify this article make it necessary that a few of the elementary rules for the construction of criminal statutes and penal statutes shall be given. These rules are well settled; the authorities are all "one way;" and a few of the late cases, only, will be cited. One of the elementary rules for the construction of a criminal statute, is that it shall be according to the natural and obvious meaning; and where there is no ambiguity in the language used, and its meaning and purpose are clear, the courts are not authorized to either limit or extend the language of the act by construction. Such a statute is open to construction in those cases, only, where there is reasonable uncertainty in the meaning.

10. Where the meaning is plain, the statute must be carried into effect according to its language, or the court would be assuming legislative authority. Where the language is clear, it is not for the court to embrace cases not described, because no reason is seen why they were not included. And this rule has been widely, we might with truth say universally, followed. No case can be brought by construction within a criminal statute unless it is completely within the words. Where an act is not, beyond all reasonable doubt, within the express terms of the statute, it may not be brought within the statute after the event by intendment. It is not sufficient that the purpose of a criminal statute should be manifest. To be effective, that purpose must find expression in its language, as required by legal rules. Courts may be authorized, sometimes, to restrain the generality of terms used in a criminal statute so as to exclude exceptional cases, but cannot enlarge the terms of a limited law.

11. California rule, as laid down in a recent case, is that the court, in construing a criminal statute, cannot read into it language or words not incorporated therein; and that where any particular article or thing is mentioned in a criminal statute as the subject of an offence, it is such articles or things or property, only, as are popularly designated by the term used that can be regarded as embraced within the prohibition. Thus, where the question involved was whether a statute making it a felony to maliciously burn a "stack" of hay included a case where the burning was the malicious burning of a "cock" or "shock" of hay, it was held that it did not. The court says: "Why the legislature did not include the act of maliciously burning 'shocks' or 'cocks' of hay within the penalty prescribed by s. 600 of the Penal Code, is a matter which need not be inquired into here. In the determination of the question decisive of the case here, it is enough to know that the legislature did not do so, and that it is for that department of the government to say what wrongful acts shall incur the penalties." Substituting the words "wireless message" for the words "shocks" or "cocks" of hay, and the s. 600 by ss. 619 and 640 of the Penal

Code, the above decision fits exactly the question of interpretation raised by the indictment returned for the publication of the wireless message "taken" by the boy "operator." Plainly, on very elementary principles of the criminal law, the act complained of is not within the prohibition and punishment of the statute relating to telegraph lines and telegraph messages.—*Central Law Journal.*

THE IDENTIFICATION OF A MARK.

A writer in the *Central Law Journal* takes exception to an article in that journal which defined a mark as a character (not a writing) made by an inked pen operated by a human hand and consisting of a single straight stroke or of two or more disconnected straight parallel strokes, or of two straight strokes crossing each other.

The writer then says:—

Marks for the authentication of legal documents are, of course, the marks under discussion. Such marks are usually made by illiterates, but are sometimes made by persons who can usually write, but who are so enfeebled by disease or age as to be unable to do so at the time of executing the document in question. In an experience of over forty-three years, marks made for the purpose of authenticating documents have always, so far as we have observed, been in the form of a cross, thus: × or +. We do not remember ever having seen one made otherwise. These marks are rarely made by the marksman holding and directing the pen himself, but usually by his touching the upper end of the penholder while held and directed by some other person, usually the one who draughted the instrument, who in fact makes the mark; but very rarely by the marksman holding the pen in his own hand, which, in turn, is itself held and directed in its motion by the hand of another person.

While a mark made for the purpose of authenticating a document will, if properly proved, undoubtedly be binding upon a marksman competent and able to write, yet the fact of his

making a mark in such case would draw suspicion upon the document; and I have never seen one so executed except in case of illiteracy or debility as above described. Almost always the name of the party executing the instrument is written in the proper place for the signature with the mark between the Christian and sir names, though this is not absolutely necessary. if the mark can be identified and proved. Such marks may unquestionably be proved by witnesses to their execution in the same manner as ordinary signatures. Can they be proved by opinion evidence? We refer not to the question of the admissibility of such opinion evidence, but to its probative value. While cases may arise in which, under peculiar surrounding circumstances and the enfeebled condition of the marksman, it may be clear that he could not have made the particular mark in question, we contend that the ordinary mark of an illiterate or enfeebled person, unless the circumstances are very peculiar and unusual, is incapable of identification by mere opinion evidence; and such is believed to be the very general opinion of those experienced in this line of research. We have never before seen the contrary opinion advanced by any writer.

Now for the reasons for this opinion: If, as is usually the case, the mark is in fact made by the scrivener, the marksman merely touching the top of the penholder, the attempt to identify the marksman in such case by opinion evidence would be flatly and absurdly impossible, for the mark takes its character, if it has any, from the one holding and directing the pen, and not from the marksman touching the top of the penholder.

The case of an illiterate actually holding and directing the pen, which rarely arises, presents a different question. The basis of the identification of any writing is the persistence of involuntary and unconscious habit carried into the written characters, which being unconscious, cannot readily be laid aside. I affirm without fear of contradiction that the illiterate marksman has no such habit and therefore no characteristics inhere in his mark. Unless it be first proved that he has practised making his mark so as to do it automatically, as is the case with a ready

writer in making letters and figures, there is no basis for an opinion, because no characteristics exist.

In the case of a person accustomed to write, but who makes his mark because of being temporarily too nervous or too feeble to write, it is clear that the making of a mark is not habitual but exceptional, and hence, as before, there is no basis for expert opinion evidence. If the real basis of expert opinion evidence above stated is kept in mind, there will be no danger of going astray in such cases. The practice of expressing an opinion upon little or no sufficient grounds, as we have attempted to shew in this case, is in our opinion largely responsible for the little esteem in which expert evidence is often held, both by the laity and the profession. A conservative course for which sufficient reason can be given is the only proper one to pursue.

We would call attention to the case of *Wolfson* v. *Oldfield* ante infra p. 623), in which Mr. Justice Robson, of Manitoba, deals with the too common practice of agents acting for both parties in the sale and purchase of property. Land agents are frequently found doing that which divine wisdom says is impossible, i.e., serving two masters. They are often so anxious to effect a sale and pocket the commission that they entirely forget that they, in most cases, owe a special duty to one or other of the parties. In the case referred to the agent was found guilty of a fraud and the sale was set aside. What was done on that occasion is being done every day by other agents and the same result would follow in many cases if the parties either knew the view judges take of such fraudulent conduct, or took the trouble to bring it to their attention. Conduct such as this has brought land agents into well-merited disrepute. A few decisions of the kind above referred to would conduce to more honest dealing and brush up the dulled consciences of those who know right from wrong in such matters, and be a salutary lesson to those who do not.

Newspaper men have opportunities for airing and making the most of their grievances in reference to the subject of libels; but a recent case referred to by the *Law Times* (Eng.) was, as therein said, an unpleasant surprise. Too often, newspapers contain libellous and unfair statements, which go broadcast, and no apology can ever undo the wrong done. The only way to insure less recklessness on the part of the writers, would seem to be a money fine. The item we refer to is as follows:—

"The law of libel as it affects newspapers has naturally been a subject of discussion during the present week at the meeting of the Institute of Journalists. No doubt the result of the case of *Hulton and Co.* v. *Jones*, 101 L.T. Rep. 831, (1910), A.C. 20, was an unpleasant surprise, but the soundness of that decision cannot be doubted. Owing to the wide publicity given to a defamatory statement that appears in the columns of a newspaper, the verdicts of juries have clearly shewn their disposition to treat libels in the press seriously, and, although we do not for one moment suggest the existing law should not be amended in some respect, such amendments, to our mind, ought to be directed more towards the existing practice and procedure in actions for libel and slander rather than the principles which apply to the law of defamation itself."

Many of our readers will remember the incident which caused the suit of Laidlaw v. Russell Sage, in New York, some years ago. It will be remembered that the multi-millionaire, Sage, used his bookkeeper, Laidlaw, as a shield to protect him from a bomb hurled at him. Norcross, the bomb thrower, was blown to pieces, and the bookkeeper was much mangled by the explosion, but the millionaire escaped unhurt. The latter declined to make any compensation to the man who thus saved his life, thereby earning for himself undying infamy. The jury gave Laidlaw a verdict for $40,000, but it was set aside by the courts on some legal technicality, and the unfortunate bookkeeper never received a cent from the heartless and shameless Russell Sage. Broken in

health, Laidlaw was cared for by two sisters. Quite recently he died a pauper, leaving a widow and a son. Russell Sage has also gone to his account. It is not our province to judge any man, but the case of Lazarus v. Dives would seem to point a moral, though it is an insult to Dives to class him with Sage.

Ever since the establishment of the weekly sitting of the High Court at London, Ont., there has been much inconvenience caused by the fact that no regular hour of sitting has been fixed, and though the matter has been occasionally brought up and the judges have frequently expressed their readiness to approve any arrangement that would do away with the inconvenience, nothing definite has ever resulted. The matter has recently been brought to the attention of Sir John A. Boyd, K.C.M.G., the President of the High Court, who after conference with his brother judges, has arranged that the sittings of the Weekly High Court at London shall hereafter be held at 10 a.m. on Saturdays. In the event of anything unforeseen occurring to prevent the sitting at the hour named, notice is to be given by telegram or otherwise to the Registrar of the Weekly Court at London. It is thought that this new arrangement will be a very great convenience and avoid much loss of time to the lawyers both of London and the neighbouring counties.

The strike of the railway workmen in Ireland has, not unnaturally, a somewhat Irish flavour. The railway companies refused to comply with the union's demand that they should not be compelled to handle goods of firms which were in dispute with their employees. The union men and their socialistic leaders may possibly have known that railway companies, being common carriers, are compelled by law to carry the goods which these men refused to handle; and may or may not have seen where the joke came in, at least they left the companies to enjoy it.

REVIEW OF CURRENT ENGLISH CASES.

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MUNICIPAL BODY—CONTRACT FOR DISCHARGE OF PUBLIC DUTY—CONTRACTORS' NEGLIGENCE—LIABILITY OF EMPLOYER FOR NEGLIGENCE OF CONTRACTOR.

In *Robinson* v. *Beaconsfield District Council* (1911) 2 Ch. 188 the defendants, a municipal body, had undertaken, under their statutory powers, the cleaning of cesspools in the district subject to its control. For the purpose of carrying out the job they made a contract with one Hawke to empty the cesspools and cart away the contents, but made no provision as to where they were to be deposited. The contractor deposited them on the land of the plaintiff, thereby creating a nuisance and damage to the plaintiff, and the question was whether the defendants were liable for the damage thus occasioned. Joyce, J., held that they were liable, and the Court of Appeal (Cozens-Hardy, M.R., and Buckley and Kennedy, L.JJ.) affirmed his decision. The court held that the municipal body was under a liability not only to provide for the removal, but also for the proper disposal of the sewage; because, after its removal from the cesspools it was their property, and they were responsible for its proper disposition.

MORTGAGE TO SECURE DEBENTURES—FLOATING CHARGE—ASSIGNMENT—PRIORITY—NOTICE.

Re Ind, Coope & Co., Fisher v. *The Company* (1911) 2 Ch. 223. This was a contest between parties claiming certain assets of a company under a mortgage which created a floating charge, and others claiming under a specific assignment of certain debts made subsequent to the floating charge. The facts being, that a company issued debenture stock secured by a mortgage of certain specified leaseholds and which also created a floating charge on all its assets. Subsequent to the creation of this charge it assigned to Wilde & Honnibal certain book debts, and rents in arrear in respect of leases, some of which were specifically included in the mortgage to secure the debenture stock, and also certain drawbacks due from the government. Wilde & Honnibal gave notice of their assignment to the tenants, but not to the government. A receiver and manager having been appointed at

the instance of the debenture holders. He gave notice of his appointment to the Crown, and to the tenants. Warrington, J., who tried the action held that the rents in arrear in respect of property not specifically charged belonged to Wilde & Honnibal, and also the drawbacks due from the government, and that the rents due in respect of property specifically charged belonged to the debenture holders, and he held that they could not acquire priority in respect of the drawbacks by first giving notice to the government, because by the terms of the floating charge the company had power to make the assignment of property not specifically charged, and the debenture holders, with notice of the assignment, could not acquire priority by prior notice to the debtor.

ADMINISTRATION ORDER—ORDER FOR SALE—CONVERSION.

In *Fountleroy* v. *Beebe* (1911) 2 Ch. 257, the short point decided by the Court of Appeal (Cozens-Hardy, M.R., and Buckley, and Kennedy, L.JJ.) is, that where an administration order is made directing the sale of land, that operates as a conversion of the land into personalty from the date of the order.

WILL—CONSTRUCTION—LEGACY TO SERVANTS—"ONE YEAR'S WAGES"—WEEKLY HIRING.

Re Sheffield, Ryde v. *Bristow* (1911) 2 Ch. 267. In this case a testator had bequeathed to each of his indoor and outdoor servants who had been in his service for five years previous to his death "the amount of one year's wages." Neville, J., held that all servants who fulfilled the condition as to service were entitled to a year's wages, irrespective of whether they were hired at yearly or weekly wages. The Court of Appeal (Cozens-Hardy, M.R., and Buckley, and Kennedy, L.JJ.) affirmed his decision. The distinction drawn between the present case and *Re Ravensworth* (1905) 2 Ch. 1, appears to be rather like a mathematical point.

HUSBAND AND WIFE—MARRIAGE WITH DECEASED WIFE'S SISTER—DEATH OF HUSBAND BEFORE 1907—DEATH INTESTATE OF SON OF FIRST MARRIAGE—NEXT OF KIN—SPES SUCCESSIONIS—7 EDW. VII. C. 47, SS. 1, 2.

In re Green, Green v. *Mcinall* (1911) 2 Ch. 275 is an illustration of the fact that the English Act permitting marriage with a deceased wife's sister (7 Edw. VII. c. 47) has the effect of

creating some curious legal puzzles. The Act validates marriages of that kind which had taken place before its passing, but provides that the validating of such past marriages is not to interfere with rights acquired by reason of their previous invalidity. In this case a man, before the Act, went through the form of marriage with his deceased wife's sister, and died before the passing of the Act. He had children by his first marriage, and also by the deceased wife's sister. One of the children of the first marriage having died intestate subsequent to the passing of the Act, the question for adjudication in this case was, whether the issue by the deceased wife's sister were entitled to share in his estate as next of kin, with the children of the first marriage, the latter claiming that they alone were entitled, and that they had such a prospective interest in the deceased's estate as was saved by the Act. But Warrington, J., held that the effect of the Act was to validate the marriage as a civil contract, and to make the issue of it legitimate, and that the issue of the first marriage had merely a spes successionis prior to the Act, which gave them no actual estate or interest such as the Act intended to protect.

COMPANY — DEBENTURE — CONSTRUCTION — PRINCIPAL PAYABLE "ON OR AFTER" A SPECIFIED DATE—PROVISION TO REPAY DEBENTURES BY LOT—EVIDENCE—INADMISSIBILITY OF PROSPECTUS TO EXPLAIN DEBENTURES ISSUED PURSUANT THERETO—PROVISION VOID FOR REPUGNANCY.

In re Tewkesbury Gas Co., Tysoe v. *The Company* (1911) 2 Ch. 279. The plaintiff's action was brought to recover the amount of a debenture which the defendant company had covenanted to pay on or after January 1, 1898. The debenture, however, contained the following provision. "The debentures to be paid off will be determined by ballot, and six calendar months' notice will be given by the company of the debentures drawn for payment." The company never paid off any debentures, nor held any ballot, but after the 1st January, 1898, the plaintiff gave the company six months' notice to pay off her debenture, and at the expiration of the notice brought the present action. Parker, J., held that in the events that had happened the principal money secured by the plaintiff's debenture was due and payable, and that if the provision regarding payment of the debentures by ballot, meant that the company was never bound to pay off the debenture unless it elected to do so, it was void for repugnancy.

PRACTICE—COSTS—CROSS ACTION—SECURITY FOR COSTS—PLAINTIFFS IN CROSS ACTION OUT OF JURISDICTION—DISCRETION.

New Fenix Co. v. *General Accident Corporation* (1911) 2 K.B. 619. This was a cross action in which a judge had reversed the order of a master, requiring the plaintiffs to give security for costs, they being resident out of the jurisdiction. The judge was of the opinion that a cross action was in the nature of a cross-bill under the old chancery practice, and according to the former chancery practice in such a case the defendants were not entitled to security. The Court of Appeal (Williams, Moulton, and Farwell, L.JJ.), however, held that there was no hard and fast rule on the subject, and it was a matter of discretion in each case, having regard to all the circumstances, whether or not security should be ordered. In this particular case, the Court of Appeal came to the conclusion that the order should be granted.

PRACTICE—DISCOVERY—QUESTIONS FOR PURPOSE OF ASCERTAINING NAMES OF OPPONENT'S WITNESSES.

In *Knapp* v. *Harvey* (1911) 2 K.B. 725 the Court of Appeal (Williams, Moulton, and Buckley, L.JJ.) held that in action to recover damages for injuries occasioned by the bite of the defendant's dog, in which the plaintiff had delivered particulars of two occasions on which the dog had bitten other persons, it was not admissible, for the purpose of discovery, for the defendant to administer interrogatories as to the names of the persons alleged to have been bitten, on the ground that such questions were merely put for the purpose of ascertaining the names of witnesses by whom the plaintiff intended to prove his case.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Moss, C.J., Garrow,
Maclaren, and Magee, JJ.A.] [Sept. 20.

ROGERS v. NATIONAL DRUG AND CHEMICAL CO.

Landlord and tenant—Agreement for lease—Covenant for renewal running with land.

Appeal by plaintiff from a judgment of RIDDELL, J.A., 23 O.L.R. 234, dismissing the plaintiff's action to recover possession of demised premises.

The lease in this case was not under seal. It was admitted that if it had been, a covenant to renew would have run with the land. The contention was that the present demise not being under seal, the agreement to renew was not binding on the lessor's assignee.

Held, that this view was too narrow, in that it took no account of the equitable rule stated by RIDDELL, J., to the effect that a tenant having a right to the legal estate, which right was enforceable in the Court in which the action was brought, equity looks upon that as done which ought to be done, and the court governs itself accordingly. The further contention that the option created was only a personal obligation was, under the circumstances, immaterial.

Bicknell, K.C., and *M. Lockhart Gordon*, for plaintiff. *Armour*, K.C., for defendants.

Full Court.] D'EYE v. TORONTO R.W. Co. [Sept. 20.

Street railway—Injury to person attempting to get on car—Findings of jury—Negligence—Evidence.

Appeal by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., upon the findings of a jury, in favour of the plaintiff, for the recovery of $2,500 damages for personal injury sustained by the plaintiff by reason of the negligence of the

defendants, as she alleged, in starting a car while she was in the act of getting into it.

The judgment of the Court was delivered by MEREDITH, J.A.: —There was evidence upon which reasonable men could have found for the plaintiff in this action. According to the plaintiff's testimony, the car was not moving when she attempted to board it; a signal was given, and the car put in motion, when she had her hand on the handrail and one foot on the step, in a position of evident danger if the car were then put in motion. Her evidence fails to bring home to any one, having any control of the car, knowledge of her predicament; but that want of evidence is supplied by the conductor, who admits having seen her, though he exculpates himself in a clear manner, so that the defendants must have failed if the jury believed that part of his testimony; but they did not. Coupling part of the plaintiff's testimony with part of the conductor's, a case is made out; for, though the plaintiff may have had no right to attempt to board the car where she did, yet, having done so and being in a dangerous position, it was an act of actionable negligence on the conductor's part to put the car in motion while, to his knowledge, the woman was in a position, safe while the car was not moving, obviously very dangerous if the car were then put in motion. The jury might, as no doubt they did, have given credit in part only to the evidence of the conductor, and add that to so much of the plaintiff's testimony as made out a case against the defendants.

Appeal dismissed.

D. L. McCarthy, K.C., for defendants. *B. H. Ardagh*, for plaintiff.

HIGH COURT OF JUSTICE.

Boyd, C.] [Sept. 19.

PATTISON *v.* CANADIAN PACIFIC RY. CO. AND CANADIAN NORTHERN RY. CO.

Railway—One railway crossed by another—Signal-man for both —Negligence—Injury to servant of one railway company—Joint servant—Liability.

Action by the widow of a locomotive fireman employed by the defendants, the Canadian Pacific Ry. Co., to recover damages for his death, alleged to have been caused by negligence of a ser-

vant of the defendants, at a place where the two railways crossed, in failing to give the proper signal.

The Canadian Northern was the senior road in possession of the track. Leave was granted to the Canadian Pacific to cross the track on condition that the Canadian Northern should appoint a man to take charge of the crossing. This man became intoxicated and the disaster resulted. The service in question was performed solely for the benefit of the Canadian Pacific. The question of liability was brought before the Railway Board, but irrespective of the accident, and the Chief Commissioner gave a ruling that this signalman should be regarded as the joint employee of each railway; and that each company should be liable for all damage suffered on its own line caused by the negligence of this joint signalman.

BOYD, C.:—This ruling was in March, 1909, and does not authoritatively control the relative liability of these defendants for what occurred in September, 1910, under the permission to cross, granted in April, 1908; but it is a valuable expression of the mind of the Railway Board as to existing legal liability.

This man, appointed by the one company and paid by the other, would be a person in charge of the signals at the crossing and interlocking switches, within the meaning of the Workmen's Compensation for Injuries Act, sec. 3, sub-sec. 5; *Gibbs* v. *Great Western R.W. Co.* 12 Q.B.D. 208.

In the evolution of the law, the old test, as to who hired and paid is being modified, if not superseded, by the more modern method indicated in the judgment of Garrow, J.A., in *Hansford* v. *Grand Trunk R.W. Co.*, 13 O.W.R. 1184, at p. 1187: *i.e.*, the whole circumstances of the employment must be looked at; and the real effect of the actual relation existing must not be lost sight of in deference to a formula about hiring or paying.

The common signal-man is to be regarded as the person employed by the company for which he is adjusting the points and giving the signals.

If the order of the Board be regarded as a quasi-contract or in the nature of a contract between the companies, the rules of common law would place liability on the company which was making use, on its own line, of the common servant for the sole prosecution of its own work at the crossing of the other road. . . . *Hall* v. *Lees*, [1909] 2 K.B. 602.

Or, if the theory of joint service be rejected, and the signalman, so appointed and so paid, be regarded as a servant or agent sui generis of both companies, then fairness and good sense

would support the proposition that the company for which the signal-man was alone acting on the particular occasion, was the principal against which relief should be sought, if the then agent of that road was guilty of misconduct by which an employee of the road was injured.

The proper conclusion in this case is, that the damages agreed upon be paid by the defendant, the Canadian Pacific Railway Company, with costs of action. As to the other defendant, the action is dismissed, without costs, as the precise question involved now arises for the first time in the courts.

F. H. Keefer, K.C., for plaintiff. *W. H. Curle*, for the defendants, the Canadian Pacific Ry. Co. *O. H. Clark*, K.C., for the defendants, the Canadian Northern Ry. Co.

Meredith, C.J.C.P.] [Sept. 25.

BENNER *v.* MAIL PRINTING CO.

Libel—Newspaper—Libel and Slander Act, s. 8—Notice—Insufficiency—Motion for judgment on pleadings—Action dismissed.

Motion by the defendants for judgment on the pleadings and admissions of the plaintiff upon his examination for discovery, in an action for a libel published in a newspaper.

Held, that the notice served by the plaintiff specifying the statements complained of was not a sufficient notice to the defendants, within the meaning and for the purposes of sec. 8 of the Libel and Slander Act, being addressed: "To W. J. Douglas, Esq., Publisher and General Manager, Mail & Empire." The notice was not given to the defendants, as required by sec. 8.

The Chief Justice also thought the point could be properly dealt with as upon a demurrer, as no evidence that might be given at the trial would help the plaintiff.

Action dismissed with costs.

C. Swabey, for defendants. *H. S. White*, for plaintiff.

Middleton, J.] RE BROOM. [Sept. 23.

Criminal law—Police magistrate—Information for perjury—Refusal to issue summons—Crim. Code, s. 655—8 & 9 Edw. VII. c. 9—Mandamus—Discretion of magistrate.

Application by James Broom for a mandamus to compel one

of the police magistrates for the city of Toronto to issue a summons against one Turner, for perjury.

MIDDLETON, J.:—Broom laid an information against Turner for assault, a warrant was issued, and the case heard before the police magistrate. There was an issue of fact before the magistrate, and he believed Turner, and did not believe Broom and his wife, and accordingly dismissed the charge. Broom now seeks to prosecute Turner for perjury; and, a summons (or warrant) having been refused by the magistrate, now moves for a mandamus.

Passing by all other difficulties in the applicant's way, it is, I think, clear that it is the duty of the magistrate, upon receiving an information, to hear and consider the allegations of the informant, and (if he thinks proper) of his witnesses (see the amendment to s. 655 of the Criminal Code by 8 & 9 Edw. VII. c. 9, sch.); and, if he is of opinion that there is no case made for the issue of a summons or warrant, to refuse it.

The magistrate's discretion in issuing or refusing to issue a summons is not subject to review in this court. He can be compelled to do his duty; but in this case he has well discharged this duty by declining to permit a witness, whom he has believed, to be prosecuted for perjury, at the instance of a witness whom he did not believe, and where, upon the perjury charge, there could be no further evidence than that given upon the trial of the assault. It is not in the public interest that the trial of a trivial assault case should be had in this indirect way.

Rex v. *Meehan*, No. 2, 5 Can. Crim. Cas. 312, *Ex p. MacMahon*, 48 J.P. 70, and *Re Parke*, 30 O.R. 498, establish the law governing me.

Motion dismissed with costs.

Province of British Columbia.

COURT OF APPEAL.

Full Court.] [Sept. 27.

HUSON *v.* HADDINGTON ISLAND QUARRY CO.

Practice—Appeal—Stay of proceedings pending appeal to Privy Council from Court of Appeal—Want of jurisdiction in Supreme Court to grant stay.

In an appeal to the Court of Appeal, judgment was given allowing the appeal with costs. Respondent having decided to

appeal to the Judicial Committee of the Privy Council, took out a summons for an order granting a stay of proceedings pending such appeal, and Morrison, J., to whom the application was made, granted the order. An appeal was taken from this order to the Court of Appeal on the ground, inter alia, that the judge had no jurisdiction to stay the execution of an order of the Court of Appeal.

Held, IRVING, J.A., dissenting, that a judge of the Supreme Court had no jurisdiction to order a stay of proceedings in the circumstances, and that the proper tribunal to apply to was the Court of Appeal.

F. Higgins, for appellant. *A. M. Whiteside,* for respondent.

Full Court.] [Sept. 29.

REX *v.* DEAKIN.

Criminal law—Affirmation—Conditions precedent to—Duty of judge—Discretion—New trial—Criminal Code, sec. 1018.

At the trial the evidence on which the accused was convicted was given by a witness who was a Church of England minister, but not actively following his profession. On being offered the Bible to take the oath in the usual form, he said: "I affirm." No objection was made at the time, but on the cross-examination being reached, he was asked: "What is your object in making an affirmation, then, instead of taking an oath on the Bible?" He answered: "I believe it is optional with the court," and, "I consider that that is a private matter of my own discretion." To a statement that for private reasons he had retired from the diocese of British Columbia, he was asked: "Are those reasons that you do not believe in Christian doctrines?" He answered: "I appeal to the judge whether I have to reveal my private conscience to the gentleman." He was not asked whether he had conscientious scruples against the taking of an oath on the Scriptures. His appeal was sustained and the defence was not allowed to cross-examine witness on his religious belief. Two questions were reserved for the opinion of the Court of Appeal: (1) Could the judge consider the statements of this witness as evidence, inasmuch as he did not state that his objection to taking an oath was on grounds of conscientious scruples?

(2) Should the judge have allowed accused's counsel to cross-examine said witness on the question of his belief in Christian doctrines, and was the accused prejudiced in his defence by my refusal?

Held, on appeal, IRVING, J.A., dissenting, that a witness claiming the right to affirm instead of taking the oath must make it clear to the court that he has conscientious scruples to the taking of an oath.

Aikman, for appellant. *Maclean,* K.C., for the Crown, contra.

Book Reviews.

Inquests and Investigations. A practical guide for the use of Coroners holding inquests in Ontario. By ARTHUR JUKES JOHNSTON, M.B., M.R.C.S., M.M.C., Chief Coroner for the city of Toronto. Toronto: Canada Law Book Company, Limited. 1911.

A very practical publication which should be in the hands of all coroners, as well as of the legal profession who are so often called upon to take part in investigations of the "Crowner's quest" class. The author jumps into his subject without preface or introduction, and gives to the reader much valuable information and many useful forms, but with a somewhat inadequate index. The universally popular Dr. Johnston does most things very well indeed, but indexing is not his strong point. We wish him great success with his first venture in the medico-legal line.

The Law of Evidence. By S. J. PHIPSON, M.A., Barrister-at-law. 5th ed. London: Stevens & Haynes, law publishers, Bell Yard, Temple Bar. 1911.

The first edition of this work was published in 1892. Since then, it has been growing in size and reputation. The raison d'etre of this edition is the fact that, since the previous one, a number of statutes dealing wholly or in part with the subject of evidence have been passed, the effect of which have been incorporated in the present edition. Over five hundred new cases have been added, which practically exhaust the English authorities of any value on the subject treated by the author. A feature of this book is the convenient arrangement in parallel columns of examples given of the various propositions stated under the headings, admissible or inadmissible.

A Guide to the Law of Betting, Civil and Criminal. By HERBERT W. ROWSELL and CLARENCE G. MORAN, Barristers-at-law. London: Butterworth & Co., law publishers, Bell Yard, Temple Bar. 1911.

This is a well-arranged collection of the law on a subject of general interest, and claims to have collected all the cases on the subject. They are grouped with explanatory comments in which the authors do not fail to express their own opinions. The book begins thus, "What is a bet? Very few English laymen would admit their inability to answer the question, 'What is a bet?' But when one is asked to frame his reply in a definition capable of bearing the test of a legal analysis, the surprising difficulty of the task becomes apparent to him." The first reference is to a case where the expression, "playing the game," now in common use, is to be found. In that case, it was the "game of foot racing." We commend the book as well to the betting fraternity as to those on the Bench, and others who seek to restrain this common development of the frailty of human nature.

United States Decisions.

BILLS AND NOTES.—A recital in a promissory note that it is secured by deed of trust is held in *Zollman* v. *Jackson Trust & S. Bank* (Ill.), 32 L.R.A. (N.S.) 858, not to destroy its negotiability, so as to charge a purchaser for value, before maturity, with notice of latent defences which the maker may have against the payee.

BILLS OF LADING.—A bank which cashes a draft in its favour, with bill of lading attached, is held in *Cosmos Cotton Co.* v. *First Nat. Bank* (Ala.), 32 L.R.A. (N.S.) 1173, not to be liable to the consignee who pays the draft upon presentation, for shortage or inferiority of quality in the shipment.

CARRIERS.—A railroad company is held in *Commonwealth* v. *Illinois C. R. Co.* (Ky.), 32 L.R.A. (N.S.) 801, not to be punishable for hauling the sleeping car of another corporation, which is not provided with compartments for coloured persons and does not bear any indication of the race for which it is set apart, or having no additional separate sleeping car for coloured passen-

gers, under a statute providing for the punishment of any railroad company running or operating railroad cars or coaches, which does not furnish separate coaches or cars for the transportation of white and coloured passengers, and have each respective coach or compartment marked with appropriate words in plain letters indicating the race for which it is set apart, where it receives no compensation for hauling the car except the regular fare for transportation of persons occupying it and the advantage of its being a part of its train.

Under the doctrine of implied police power, a common carrier is held in *Jansen* v. *Minneapolis & St. L. R. Co.* (Minn.), 32 L.R.A. (N.S.) 1206, to be bound to exercise the utmost diligence in maintaining order and in guarding its passengers against assaults by other passengers, which might reasonably be anticipated or naturally expected to occur.

A railroad company is held in *Houston & T. C. R. Co.* v. *Bush* (Texas), 32 L.R.A. (N.S.) 1201, not to be liable for the act of a station porter who boards a train and makes an assault on a through passenger travelling thereon, for the purpose of satisfying a personal grudge, where its other servants are not negligent in failing to anticipate and prevent the assault.

A passenger is held in *Penny* v. *Atlantic C. L. R. Co.* (N.C.), 32 L.R.A. (N.S.) 1209, to be guilty of contributory negligence which will prevent his holding the carrier liable for injury from a stray bullet fired by another passenger, if the danger of such injury could have been apprehended by him, and he did not turn out of his way or make any effort to avoid it, although the conductor who knew of the danger failed to give him warning.

A fireman riding free on a street car, who, contrary to known rules of the company requiring him to ride on the rear platform, and forbidding persons to ride on the running boards of cars which are next to the parallel track, takes his position on such running board, is held in *Twiss* v. *Boston Elevated R. Co.* (Mass.), 32 L.R.A. (N.S.) 728, to be a mere licensee, and not to be entitled to hold the company liable for injuries negligently inflicted upon him while there; and it is held to be immaterial that the conductor assented to his remaining there, since he had no authority to waive the rules of the company.

A baggage man with express authority to notify the conductor of trespassers upon the train, and, upon request, to aid him in expelling them, is held in *Daley* v. *Chicago & N. W. R. Co.* (Wis.), 32 L.R.A. (N.S.) 1164, to be properly found to be acting within the scope of his authority in expelling one without report-

ing him to the conductor, so as to render the railroad company liable in case he causes injury by the use of excessive and unusual violence in so doing.

That it is the duty of a common carrier to provide reasonably safe approaches to its cars, and to provide such approaches with lights at night, is declared in *Messenger* v. *Valley City Street & I. R. Co.* (N.D.), 32 L.R.A. (N.S.) 881.

The liability of a carrier for suffering on the part of a sick person, due to its neglect promptly to transport and deliver medicine to him, is held in *Hendricks* v. *American Exp. Co.* (Ky.), 32 L.R.A. (N.S.) 867, not to be affected by the fact that the order was given without his knowledge or approval.

A railroad company is held in *Dingman* v. *Duluth, S. S. & A. R. Co.* (Mich.), 32 L.R.A. (N.S.) 1181, not to be prevented from granting to a particular person engaged in transferring passengers and baggage the exclusive right to a representative on its trains to solicit patronage, by a statute requiring such corporation to grant equal facilities for transportation of freight and passengers without discrimination.

LIBEL.—A petition presented to a police magistrate, charging misconduct on the part of occupants of a dwelling and asking that they be required to move therefrom, is held in *Flynn* v. *Boglarsky* (Mich.), 32 L.R.A. (N.S.) 740, to be absolutely privileged, if the charges are pertinent, material, and positive, although it cannot properly be called a pleading in a case.

TRESPASS.—The maintenance of the portion of the foundation wall of the building, which had without right been projected over the boundary line into the soil of the adjoining owner, is held in *Milton* v. *Puffer* (Mass.), 32 L.R.A. (N.S.) 1009, to be a continuing trespass or nuisance and for the injury inflicted by it upon him, one succeeding to the title of the adjoining property may maintain an action against the wrongdoer.

Bench and Bar.

JUDICIAL APPOINTMENTS.

Kenneth John Martin, of the city of Charlottetown, in the Province of Prince Edward Island, Barrister-at-law; to be Judge of the City Court of the city of Charlottetown. (Oct. 7.)

Flotsam and Jetsam.

Recently the deaths have occurred of three notable lawyers. Last week we had to announce the decease of Sir Samuel Walker, the Lord Chancellor of Ireland, on the 13th inst., and this was followed on Friday last week by the death of Lord James of Hereford, and of His Honour Judge Willis on Tuesday last. For some time past Lord James had practically retired from all political and judicial duties, and at the time of his death was in his eighty-third year. Judge Willis was but seventy-six years of age, and, until the beginning of the illness which has resulted in his death, shewed much of the vigour that has characterized his life. In him the profession will lose a member "of the highest and most attractive character"—to quote the *Times*—and one of undoubted popularity.—*Law Times.*

WOULDN'T TAKE ANY:—The late Lord Young, of the Scottish Bench, was responsible for enlivening many a dull case. One of the best remarks that ever fell from his lips was the reply to a counsel, who urged on behalf of a plaintiff of somewhat bibulous appearance: "My client, my lord, is a most remarkable man, and holds a very responsible position; he is manager of some waterworks."

After a long pause, the judge answered: "Yes, he looks like a man who could be trusted with any amount of water."—*Law Notes.*

In the *Daily Mail* last month we read a report of a murder trial. The *Mail* quoted from the *Sun* as follows:—"Counsel closed a powerful argument by singing to the jury in a tear-choked voice, 'Home, Sweet Home.' The song trembled on his lips and brought tears to the eyes of all the jurors, the defendant, and the crowd which was packed in the room. It was a dramatic finish to the most dramatic murder trial in Texas history." We venture in all humility to suggest that our leading counsel should take a hint. We should like to hear, say, Sir Edward Carson (or in this country say, Æ. Irving, K.C., A. B. Aylesworth, K.C., or E. F. B. Johnston, K.C.) concluding an impassioned defence with a pathetic rendering of some appropriate song.—*Law Notes.*

Canada Law Journal.

VOL. XLVII. TORONTO, NOVEMBER 1. No. 21.

SUCCESSION DUTIES AND OTHER ILLUSIONS.

There is no method of raising a revenue so attractive as that known as the succession duties, first introduced in England by Sir William Harcourt, Chancellor of the Exchequer under Mr. Gladstone; adopted in this country by the Government of the Hon., now Sir, George Ross; violently opposed by the Conservative opposition of that day, but continued by them when their turn came to provide for the provincial expenditure. This particular form of taxation appeals to the Socialist because it is an attack upon property, specially aimed at the rich minority for the benefit of the poor majority. It appeals to the Finance Minister because it brings large sums into the exchequer; can be easily collected, and, affecting only a fraction of the population, does not give rise to any disquieting agitation; and it appeals to the public at large because the benefit which accrues to the revenue falls as a burden upon only a few, and those best able to bear it.

One of the distinctive features of this tax is that it is levied upon capital as distinguished from income, and it is this feature which is, from any sound view of political economy, liable to the most serious objection. All other assessed taxes, whether upon realty or personalty, are paid out of income, do not impair the capital, and bear equally upon all. The succession duties are not only a direct tax upon capital, but are most unfair in their application. One estate may escape the burden for a whole generation, while another may, during the same period, have to contribute several times over, each time upon a reduced capital. The writer knows of one estate in Scotland which during the last ten years has been thrice depleted by the operation of this impost.

Apart from specific objections to this form of taxation, we find in it the germ of the socialistic doctrine of the equal distribution of wealth, to be brought about in the end by making the State the foundation from which every man should receive his share of the general revenue. From this it logically follows that all men must be placed upon an equality, no matter how much they may differ in character or capacity. This idea the trade unions have carried out in practice, the many not only asserting the right to control the wills of individuals, but also to rob them of their property—that is the results of their labour—which they effectually do when, by reducing all to a dead level of earning power, they do away with all freedom of contract. The efficient workman cannot get the full value of his work because the employer must pay to the inefficient more than he is capable of earning.

Thus with the caucus in politics, combination in trade, and unionism in labour, a man can neither vote, trade, nor work, except as his masters tell him. This is the freedom of the twentieth century which we are told belongs to Canada. Inter arma silentur leges! Equally mute is the voice of law when all these influences combine to thwart its power, and deaden its influence.

Our great illusion is that we are living under the rule of a democracy. We fondly suppose that we are governed, or govern ourselves, through the free voice of a free people. There may be freedom of thought, but there is no freedom of expression. The man in political life who utters an opinion not in accordance with the policy laid down in caucus, and carried out by the executive, will soon find it best to hide his head in obscurity. The man who sells a pound of sugar, or a yard of cotton, at rates different from those laid down by the guilds which regulate those trades, may as well put up his shutters. And the workman who tries to make his own bargain for the price of his labour will be lucky if he escapes with a broken head from the peaceful picketers of a trades union. Thus freedom begets tyranny, and tyranny is the mother of anarchy.

Interference with personal liberty takes away the chief motive for industry and enterprise, and therefore tends to pro-

duce and perpetuate poverty—the very thing which our social reformers are trying to get rid of. The workman who is not allowed to make the best use of his ability will soon lose the desire to better himself, and will sink to the level of mediocrity, if not below it, and the work he might have done if allowed the free use of his powers will be lost. But there is danger of a greater loss even than this—the loss of the sense of personal responsibility. In the words of a well-known writer:—

"The principle of personal responsibility is the necessary counterpart of the principle of personal liberty. Both are essential to social progress and human happiness. We cannot hope to preserve the one if the other be destroyed. Unless a man has liberty to give effect to his own judgment, he speedily ceases to feel any sense of moral responsibility. The destruction of individual liberty involves also the destruction of that moral sense which makes social life possible."

Our limits will not allow us to pursue this subject further, but observers cannot fail to see the tendencies to which we have referred going on around us, and producing their inevitable results. Evils great and many there are to be combatted, and schemes for reform are put forward with confidence. That any of them will succeed which do away with personal liberty and personal responsibility we do not believe.

There is one scheme older and from higher authority than any which our social reformers have yet propounded. It is the golden rule laid down long ago, so simple and yet so profound—that we should do to others as we would they should do to us. If this rule were adopted and acted upon, the setting of class against class would cease, both strikers and strike breakers would cease to trouble us, the secret of a living wage would be found, the agitator would find his vocation gone, and to democracy we might submit without fear of suffering either in our self-respect, our purses, or our persons.

IMPLIED WARRANTY OF AUTHORITY BY AGENT.

In an earlier article in this journal (40 C.L.J. 685) the writer discussed the leading case on this subject, *Collen* v. *Wright* (1857), 8 E. & B. 647, and the later cases in which the principle laid down in that case was considered and extended. The latest case referred to in that article was *Starkey* v. *Bank of England* (1903), A.C. 114.

The result of *Collen* v. *Wright* as stated by Willes, J., was: "A person professing to contract as agent for another, impliedly, if not expressly, undertakes to, or promises the person who enters into such contract, upon the faith of the professed agent being duly authorized, that the authority which he professes to have does, in point of fact, exist."

In the case in the House of Lords it was held that the rule in *Collen* v. *Wright* was "a separate and independent rule of law," and that "as a separate and independent rule of law it is not confined to the bare case where the transaction is simply one of contract, but it extends to every transaction of business into which a third party is induced to enter by a representation that the person with whom he is doing business has the authority of some other person" (pp. 118, 119).

This case was followed in *Sheffield Corporation* v. *Barclay* (1905), A.C. 392, where a banker in good faith sent to a corporation a transfer of corporation stock which subsequently proved to be a forgery. It was held by the House of Lords that both parties having acted bonâ fide and without negligence, the banker was bound to indemnify the corporation against their liability to the person whose name had been forged, upon the ground that there was an implied contract that the transfer was genuine.

Lord Halsbury, L.C., in his judgment (p. 397) adopts the following as an accurate expression of the law: "It is a general principle of law that when an act is done by one person at the request of another, which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it

is entitled to an indemnity from him who requested that it should be done." See also *Bank of England* v. *Cutler* (1908), 2 K.B. 208.

Two very recent cases have been decided in which the above principles have been followed. These decisions are of great practical importance to solicitors, and do not seem to have attracted, in Ontario at any rate, the attention which they should receive. They are *Yonge* v. *Toynbee* (1910), 1 K.B. 215, and *Simmons* v. *"Liberal Opinion"* (*Re Dunn*) (1911), 1 K.B. 966, 27 T.L.R. 278.

But before considering these, we must notice the old case of *Smout* v. *Ilbery* (1842), 10 M. & W. 1, 12 L.J. Ex. 357, 62 R.R. 510. The defendant was a widow whose husband had gone to China and there died. The plaintiff was a tradesman who had previously supplied goods to the defendant on the credit of the husband and had been paid for them by him, the husband to the knowledge of the defendant being resident abroad. It was not until a year after the departure of the defendant's husband that she learned that he had died some six months previously. In the meantime, both parties being ignorant of the death of the husband, the defendant ordered necessaries from the plaintiff which he had supplied to her. The action was brought to recover the value of the goods supplied to the defendant from the date of her husband's death up to the time she knew of it. *Held*, that the circumstances being equally within the knowledge of both parties, and the widow not having omitted to state any fact known to her which was relevant to the existence or continuance of her authority, she was not liable for the price of the necessaries.

The law in such a case was thus stated by Sir W. Anson: "The death of the principal determines at once the authority of the agent, leaving the third party without remedy upon contracts entered into by the agent when ignorant of the death of his principal. The agent is not personally liable, as in *Kelner* v. *Baxter*, L.R. 2 C.P. 174, as having contracted on behalf of a non-existent principal; for the agent had once received an authority

to contract. Nor is he liable on a warranty of authority as in *Collen* v. *Wright;* for he had no means of knowing that his authority had determined. Nor is the estate of the deceased liable; for the authority was given for the purpose of representing the principal and not his estate. The case seems a hard one, but so the law stands at present." Anson's Law of Contract (1906), 11th ed., p. 386.

The facts in *Yonge* v. *Toynbee,* supra, were shortly as follows: Before the commencement of this action, which was then threatened, the defendant had instructed a firm of solicitors to act for him, and had subsequently become, and was certified as being, of unsound mind. This fact was not known to the solicitors. After the issue of the writ the solicitors undertook to enter, and in due course did enter, an appearance for the defendant, acting on the original instructions received from him.

Pleadings were delivered and various interlocutory steps were taken in the action. After notice of trial had been given, the solicitors for the first time discovered that the defendant had become of unsound mind, and they immediately informed the plaintiff's solicitors of the fact. An application was then made on behalf of the plaintiff for an order that the appearance and all subsequent proceedings in the action should be struck out, and that the solicitors who had assumed to act for the defendant should be ordered personally to pay the plaintiff's costs of the action up to date, on the ground that they had so acted without authority.

It was held by the Court of Appeal that the solicitors who had taken on themselves to act for the defendant in the action had thereby impliedly warranted that they had authority to do so, and therefore were liable personally to pay the plaintiff's costs of the action. It was argued on behalf of the solicitors that the only cases in which solicitors had been ordered by the court in the exercise of its disciplinary jurisdiction, to pay the opposite party's costs in an action, on the ground of having acted without authority, were cases where the solicitors had acted wrongfully as between themselves and their clients, and where,

therefore, they might, as between themselves and their clients, have been ordered to bear these costs. That there was only a very imperfect analogy between the case of solicitor and client, and that of an ordinary agent and his principal, which is the kind of case to which *Collen* v. *Wright* (supra), applies. The solicitor retained to defend an action is not like an agent employed to sell goods. He is a legal expert and officer of the court, and he is bound to go on taking the necessary steps in the conduct of the defence until he has notice of the revocation or determination of his retainer. The solicitors here only did what was their duty, and did nothing either legally or morally wrong, in taking the steps which they took.

Smout v. *Ilbery* (supra), and *Salton* v. *New Beeston Cycle Co.* (1900), 1 Chy. 43, were relied on. The Court of Appeal, however, were of opinion that the particular nature of the agency was not very material (p. 228), that the true principle as deduced from the authorities rests not upon wrong or omission of right on the part of the agent, but upon an implied contract. Referring to the argument based upon the special character of the agency of solicitors, it was said by Swinfen Eady, J.: "It is, in my opinion, essential to the proper conduct of legal business that a solicitor should be held to warrant the authority which he claims of representing the client; if it were not so, no one would be safe in assuming that his opponent's solicitor was duly authorized in what he said or did, and it would be impossible to conduct legal business upon the footing now existing; and whatever the legal liability may be, the court, in exercising the authority which it possesses over its own officers, ought to proceed upon the footing that a solicitor assuming to act, in an action, for one of the parties to the action warrants his authority" (p. 234).

The result of this case would seem to be that *Smout* v. *Ilbery* is overruled. "The agent is liable whether he represents himself as having an authority which he has never possessed, or as having an authority which has determined without his knowledge, even though he had no means of finding it out."

"It seems also no longer open to doubt since the recent case of *Yonge* v. *Toynbee*, that insanity annuls an authority properly created while the principal was sane" (Anson (1910), 12th ed., p. 391).

"*Smout* v. *Ilbery*, which has so long held the position of a leading case, passes into the lumber room of the overruled" (35 Law Magazine, p. 341).

Simmons v. "*Liberal Opinion*" (*Limited*), supra, is another case of great importance to solicitors. The plaintiff brought an action claiming damages for libel contained in a paper purporting to be published by *Liberal Opinion* (*Limited*). An appearance was entered for the defendants by one D., a solicitor who continued to act for the defence in the action. The action came on for trial, and it was then discovered that there was no such limited company either under the Companies Act or under the Industrial and Provident Societies Act. The jury gave a verdict for the plaintiff for £5,000 damages. An application was then made on behalf of the plaintiff that the solicitors for the defendant should be made personally responsible for the plaintiff's costs, on the ground that the defendants were not a limited company as stated in the pleadings, and that, therefore, the solicitors had improperly accepted instructions to appear for them in that capacity. Mr. Justice Darling came to the conclusion that D. had authority to act for certain persons who carried on business under the style of *Liberal Opinion* (*Limited*), and it could not, therefore, be said that he had no clients. He, therefore, refused the application.

The Court of Appeal, however, held that the proceedings in the action had been futile and the costs incurred by the plaintiff had been absolutely thrown away by reason of the appearance entered for a non-existing corporation, and referred to the well-established principle that a solicitor must be held to warrant the authority which he claims as representing his client. They were consequently of the opinion that they had jurisdiction to order the defendant's solicitors to pay the plaintiff's costs of the action and that they ought to exercise this jurisdiction.

"The decision, hard though it may be on a solicitor who has acted in good faith, seems to us to be covered by the judgment in *Yonge* v. *Toynebee*. It exemplifies the principle on which the warranty of authority is founded, viz., that if one of two innocent parties must suffer it should be the one who has induced the other to act to his prejudice by an unqualified assertion of an existing authority" (46 Law Journal, p. 116).

These two cases were no doubt special in their character, but they very forcibly illustrate the responsibility resting upon solicitors in assuming to act for clients and the need of careful enquiry into the position and capacity of the clients.

N. W. HOYLES.

THE VALUE AND ADMISSIBILITY OF PHOTOGRAPHS AS EVIDENCE.

In early times, photographs, as is matter of common knowledge, were unknown. The discovery and development of the photographic art being of comparatively recent achievement. Like many other industries, this has developed from a very crude and somewhat clumsy state into a well-perfected science. The great progress which has been made in the perfection and simplicity of photography has rendered this science and its achievements a useful adjunct in trials. It often happens that a photograph of some object or locality is of the greatest service and assistance in determining controverted issues of fact. There can be no question but that a photograph of an object, locality, etc., is always admissible in evidence when it is a correct reproduction of the appearance of the object or place and such a reproduction is necessary in order to assist the jury to better understand and weigh the facts in any case. Of course, in order to be proper as evidence, the photograph must shew the object as it existed at the time of the controversy or at the time when the thing photographed had the same appearance as it had at such time. Thus the photograph of the scene of a railway

accident at the time or so soon thereafter that no change in appearance had taken place, would be admissible; but it is also competent to shew that the object or scene had changed at the time the photograph was made. Thus, where a hole which is alleged to have caused an accident and injury, a photograph of it after it had been filled and its appearance thus materially changed from the time of the injury, would not be proper. A photograph taken three months after an accident is not admissible to shew the appearance of the premises unless it be affirmatively shewn that the appearance at the time of the accident and of taking was the same. In an action against a city for damages for negligently locating and constructing a sewer, it has been held that stereoscopic views from a photo of the locality taken the day after a heavy rain, are admissible. A photograph of the locality of a murder taken soon after the crime and before any material change in the surroundings has taken place, is competent. Where a murder had been committed in a saloon and a photograph of the interior had been taken before any change in the arrangement of the furniture, etc., and which shewed the figures as nearly as could be, and shewn to have been a correct representation of the situation, it was held proper evidence. It is also proper to shew by photographs the appearance of certain real property as a result of grading or other injury thereto, to aid the jury in ascertaining the nature, effect and extent of the injury. Of course, a photograph cannot be properly received in evidence until it be shewn affirmatively that the thing or locality photographed has some connection with or bearing on some fact in controversy. Where some right is asserted or denied by reason of a wrecked building, a photograph thereof taken immediately thereafter is proper. The courts admit that by this method of bringing the condition of things before the jury, they are enabled to draw a more correct conclusion than from a mere verbal description by the witnesses. The fact that a photograph of a locality is taken at a different season of the year from the time of the matter in issue does not render the same inadmissible. The difference in the appearance

by reason of the season can be explained. Photographs of a train wreck have been admitted to shew the nature and extent of the wreck. Such a photograph has been held admissible even where a wrecking train had partly changed the appearance of the wreck, the photo being introduced only to shew the force of the impact and enough of the wreck being still intact to shew this. The aid of a photograph is often resorted to with the approval of the courts to shew or disprove identity in various cases. But the identity cannot be established by proving that the picture offered in evidence is that of the person in dispute. It must be first duly verified as that of the person in question. Then when the disputed person is before the court, it is for the jury to determine whether he is the same person that the photograph shews. A photograph is competent to shew the personal appearance of one accused of crime at a certain time to assist the jury in arriving at a correct conclusion as to the identity. Thus, where a witness had testified that the defendant had not worn sidewhiskers, and that witness had known him since the spring of 1887, it was correctly held that a photograph taken in July, 1887, shewing the defendant with sidewhiskers, and proven to be a correct likeness, was competent evidence in contradiction of the testimony to the contrary. Upon the same principle, it is, of course, competent to introduce properly verified photographs to assist in ascertaining the identity of a person found dead. In an action for damages growing out of an unlawful assault and battery, or other personal injury, a ferrotype of the person injured taken shortly after the injury, is admissible to shew the nature and the extent thereof. And this is true even though the plaintiff's person is exhibited to the jury, but after the appearance of the injury had been changed by the process of healing. They may be used to shew the appearance of the body just before and after an injury as illustrating the nature of the injury. Likewise, upon a plea of self-defence it is competent to shew the physical condition and appearance of the defendant. They may be used to shew the appearance and condition of a child at different

times, who is alleged to have been neglected and injured in health in violation of a penal law by one having his care and custody. Similarly, it is held where one is charged with having deprived domestic animals in his custody of substance in violation of law, he may introduce photographs of the animals shewn to have been taken at the time of the alleged neglect. A photo has been permitted in evidence after the death of the person in controversy to establish the paternity of a child by permitting the jury to compare the alleged picture of the alleged father with the appearance of the child exhibited to the jury. Where a person is accused of a crime it is proper to introduce a photo of him though it shews the person without glasses, where the accused refuses to remove his glasses for the observation of the jury. The weight of the picture as evidence, of course, being for the jury. In a murder case where the throat of the deceased was cut, and the character and extent of the wound being important in developing the facts, the Supreme Court of Georgia, in sustaining the admissibility of a photograph, said: "A photograph of the wound of deceased was admitted as evidence over the objection of the defendant; the character of the wound was important to lucidate the issue; the man was killed and buried, and a discription of the cut by witnesses must have been resorted to. We cannot conceive a more impartial and truthful witness than the sun, as its light stamps and seals the similitude of the wound on the photograph put before the jury; it would be more accurate than the memory of witnesses, and as the object of all evidence is to shew the truth, why should not this dumb witness shew it?" In an action against a railway company by a servant for injuries resulting from an unblocked frog it has been held proper to introduce in evidence a photograph of the frog taken the morning after shewing the frog unblocked to contradict a witness who testified that all frogs were thus provided. But in cases like this, the fact that the block may have been removed after the injury and before the taking of the photograph would make the question of weight to be given the photograph one for the jury.

It has been sometimes claimed that the introduction of photographs in evidence transgresses the rule against secondary evidence. But this is not necessarily true. In Wisconsin it is practically held that a photograph of an injured limb cannot be admitted over objection if the original could with reasonableness and propriety be produced in court for the inspection of the jury. And there would be much force in this contention if the appearance of the limb at the time of exhibition and when the photo was taken was the same. The learned court also held, however, that photographs "may be used to identify persons, places and things, to exhibit particular locations or objects where it is important that the jury should have a clear idea of the same, and the photographs will better shew the situation than the testimony of witnesses and where the testimony of witnesses will be better understood by the use of photographs, and to detect forgeries and to prove documents in cases where originals cannot be readily procured." While a photograph is in a sense secondary evidence it is nevertheless admissible in all cases where the object or thing shewn thereby cannot with reasonable convenience be produced in court. Though a photograph is competent evidence under the restrictions shewn, the use of such evidence must be confined to cases where it will serve to illustrate articles, objects, scenes and localities, the importance of which may arise from any issue of fact and where it is not practicable to bring these things into court or have them viewed by the jury. A photograph, in other words, can be used in evidence only where it serves the purpose of the best evidence reasonably to be had under the circumstances. Upon this salient principle it is correctly held that a photograph of a letter or other document cannot be admitted in evidence if the original can be produced, for to permit this would be a clear violation of the rule that the best evidence must be offered, and the photograph is the best evidence only when better cannot be reasonably had. It has been held, however, that photographic copies of a note admitted to be genuine and of an alleged forged note are admissible for comparison when shewn to be correct representa-

tions. But this would not ordinarily be correct if the forged and genuine instrument could be introduced, though doubtless enlarged photographs of each in such cases might be proper, as this would necessarily bring out more visibly and clearly any resemblance or lack of same.

One of the unusual facilities afforded by the science of photography for investigation of what would be otherwise hidden is the X-ray photograph. As is now matter of common knowledge, by reason of these rays it is possible to photograph into and through the body and locate and shew the condition of the bones or any solid body. So, when these photographs are shewn to be correct representations of the condition of a bone or any metallic substance in the body, they may be introduced in evidence to shew the condition thereof. "It is not to be understood, however, that every photograph taken by the Cathode or X-ray process would be admissible. Its competency, to be first determined by the trial judge, depends upon the science, skill and intelligence of the party taking the picture and testifying with regard to it, and that lacking these important qualifications, it should not be admitted. It is not conclusive upon the triers of fact, but is to be weighed like other competent evidence." In the nature of things, it is both necessary and proper to require due caution in admitting photographs of this character. This is true because the process is so complicated and difficult and affords such a limited means of proper identification and verification by reason of the very nature and limits of the process. It is a comparatively easy matter to identify an ordinary photograph because witnesses can usually be produced in abundance to testify as to the correctness of the likeness. But in case of the X-ray process, only those, ordinarily, could produce such testimony as operated the instrument in making the exposure or who were present and saw the status of the otherwise hidden objects by means of this same process.

The ordinary methods of photographic reproduction are now so well and generally known and understood that courts do not hesitate to take judicial notice of the fact that correct photographs of any object are easily made and that, as a gen-

eral rule, the camera does not reveal a false likeness. Where an X-ray photograph is offered in evidence and conclusively proven to be correct, the trial court cannot arbitrarily exclude it and to do so is reversible error.

But in all cases and without exception, a photograph must be shewn to correctly reflect the appearance of the thing photographed, otherwise it would be a rank violation of the fundamental rules against hearsay and secondary evidence to permit such evidence to be considered. Of course, there must be some means of deciding when a photograph is shewn to be sufficiently correct to be admissible. This, necessarily, is a preliminary question for the court to decide in all cases. The ruling of the trial court on this question is practically as effective and conclusive on appeal as the verdict of a jury. When the photograph is thus admitted by the trial court its weight and force as evidence then become questions for the jury. In determining whether the accuracy of an ordinary photograph offered in evidence is sufficiently shewn, it is not necessary that the person who made the picture be produced as a witness. This fact may, ordinarily, be shewn by any one who is familiar with the object or thing photographed to the extent that he can say, as a witness, that the photograph is a correct likeness. Of course, if the accuracy of the photograph should become an issue by reason of conflicting evidence, the issue on this point would be for the jury. It may be shewn by the photographer taking the picture that he retouched the negative in order to more clearly bring out some object shewn thereby. It is very clear that it would be reversible error to permit a photograph to be introduced in evidence without some evidence of its correctness. Photographs are admitted in evidence upon the same principle that maps, diagrams, etc., are admissible. Properly and sufficiently identified and proven correct by witnesses and circumscribed within due bounds by the court in admitting them, photographs furnish a most convenient, reliable and satisfactory agency in elucidating an issue of fact and they are increasing in this usefulness constantly.—*Central Law Journal.*

According to modern usage, a declaration of war not being necessary, nations generally content themselves with a proclamation to their own citizens of the existence of war and a formal notice to neutral States. In a civil war there is never a formal declaration of war. It has been held that the great civil conflict in the United States began with the President's proclamation of blockade of the 27th April, 1861. The United States did declare war against Great Britain in 1812 and against Spain on the 25th April, 1898; but in the first instance the United States began active hostilities before the news could cross the ocean, and, in the second, the declaration recognized that war had existed since the 21st April. England captured New York, in 1664, before declaring war against Holland, and, before the Seven Years' War was declared, captured hundreds of ships and thousands of prisoners from France. Since the peace of 1763 the European practice has been even more irregular, and the necessity of a declaration is generally denied. In 1870, the representatives of France at Berlin handed the German Government a note simply declaring that "le gouvernement de S.M. Imp. se considère dès à présent comme étant en état de guerre avec la Prusse," and in 1877 a dispatch to the same effect was delivered to the representative of Turkey at St. Petersburg. Such are the survivals of the mediæval practice according to which knightly honour forbade an attack until after full notice.—*Law Times.*

At the meeting of the English Law Society held at Nottingham, the President, in his address dealt exhaustively with the subject of land transfer in England. This matter is attracting much attention at the present time; and the legal profession, have, as usual, come to the front in a further effort for a reformation in the mode of facilitating and cheapening transfer of land and the removal of technicalities. We, in this country, with comparatively short and simple titles, can scarcely appreciate the immense difficulties that lie in the way of their effort.

At the banquet of the Law Society in Nottingham which followed these meetings, Sir Edward Fraser expressed as his opinion something which we have already voiced in these columns. He said, "If the solicitors of England, in the exercise of their just rights, and for the maintenance of their just powers, will act coherently and solidly together, we are of all sections the most powerful in the country." We wish our brethren at the Bar would take these pertinent remarks to heart. Did they realise their power, they might have the wisdom to use it to place the profession in a sounder and safer position so far as it is affected by the depredations of unlearned and unlicensed pirates. The medical profession, and other classes of less note, seem to receive an attention at the hands of the legislature which is denied to lawyers, simply because the latter do not work together in claiming their just rights and a reasonable protection.

The most recent move in England in the direction of the adjustment of differences between labour and capital—between employers and workmen, has been the institution of an Industrial Council, intended to be representative of both classes. The object, of course, is the establishment of a Board which would deal on an equitable basis between contending parties, and, so far as possible, prevent these industrial trade and labour disputes which so seriously affect the welfare of the country. The usefulness of such a body would, in the first place, depend largely upon its personnel, and, after that, upon the wisdom, fairness and firmness of its members. It is said that the Council about to be chosen is to be presided over by Sir George Askwith, K.C.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

SALE OF GOODS—C.F.I. CONTRACT—POLICY HANDED OVER WITH GOODS—HONOUR POLICY EFFECTED BY SELLER ON INCREASED VALUE—RIGHT OF BUYER TO HONOUR POLICY—MONEY HAD AND RECEIVED.

Strass v. *Spillers* (1911) 2 K.B. 759. The facts of this case though somewhat complicated involve after all a very simple question of law. The plaintiffs who were grain dealers, on 2nd February, purchased from Allatini a cargo of wheat subject to a term that the sellers should insure it for 2 per cent. over the invoice price (37s. 1½d. per 480 lbs.) and in accordance with the contract received from Allatini a policy for £21,300. The market price of wheat rose and on February 9th the plaintiffs effected a policy on increased value for £2,000 with the London Assurance Corporation, and another for £2,000 with the British and Foreign Marine Insurance Co. On March 16th the plaintiffs resold the cargo to Allatini for 39s. 6d. per 480 lbs., and on similar terms as to insurance; the plaintiff returned the policy received from Allatini and in order to meet the additional insurance required by reason of the increased price, viz., £1,508, they divided one of the £2,000 policies into two policies for £1,508, and £492, respectively. The £1,508 policy was handed over to Allatini, and the two policies for £2,000 and £492 were retained by the plaintiffs. The cargo was sold under similar terms as to insurance to different parties, and the defendants ultimately became the buyers on those terms; while they were the owners a loss occurred, and an adjustment of the loss was made, whereupon the plaintiffs claimed to be entitled to recover on the £2,000 and £492 policies and they sent the policies to Allatini with a request that they should be forwarded to the receiver of the cargo, in order that the plaintiffs claim thereunder might be adjusted, and that the amount due to them might be collected. Allatini and the other sub-purchasers forwarded them from one to the other with this request, until they reached the defendant's hands, who forwarded them to the receiver and collected the amount payable thereunder which, however, the defendants then claimed to retain for their own use; but Hamilton, J., who tried the action held that the policies in question were honour policies effected by the plaintiffs for their own benefit, and that the defendants had no claim thereon by virtue of the subsequent transfers of the cargo, and

were therefore liable to the plaintiffs for the proceeds, as money had and received to their use.

NEGLIGENCE—ELEMENTARY SCHOOL—EDUCATION AUTHORITY—NEGLIGENT ACT OF TEACHER—INJURY TO SCHOLAR—MASTER AND SERVANT—LIABILITY OF EDUCATION AUTHORITY FOR NEGLIGENCE OF TEACHER.

Smith v. *Martin* (1911) 2 K.B. 775. This was an action by the pupil of a public elementary school to recover damages against a teacher and the municipal corporation having the control of the school in which the teacher was employed, for injuries sustained by the plaintiff, by reason of the negligence of the teacher. The plaintiff was a girl of nearly fourteen, she had had two courses of lessons in cookery, and was taking a third course, and had also two courses of lessons in laundry work. The negligence assigned consisted in the fact that the teacher of the class of which the plaintiff was a member had told the plaintiff to go to an adjoining room and poke the fire and pull out the damper of a stove. In performing this apparently simple operation the plaintiff's pinafore caught fire and she was injured. The jury found that in giving the order the teacher had been guilty of negligence and they gave a verdict for the plaintiff for £300. Laurance, J., who tried the action gave judgment against the teacher for that sum, but dismissed the action as against the municipal corporation. On appeal, however, his decision as to the corporation was reversed; the Court of Appeal (Williams, Moulton, and Farwell, L.JJ.), holding that the order of the teacher was given in the course of her employment, and that the relationship of master and servant existed between the teacher and the municipality, and consequently the latter were liable for the negligence of the teacher. It is somewhat hard to understand, from the facts as given in the report, on what ground the jury based the finding of negligence.

DAMAGES—MEASURE OF DAMAGES—BREACH OF CONTRACT EXCLUDING FROM COMPETITION—REMOTENESS.

Chaplin v. *Hicks* (1911) 2 K.B. 786 was a somewhat unusual case. The defendant advertised that if ladies wishing to become actresses would send him their photographs he would publish them, and call for a public ballot from the readers of the newspapers in which the portraits were published, as to which was considered the most beautiful, and that the fifty who should receive the most ballots would be seen by the defendant

by appointment, and from them he, defendant, would select twelve who were to receive engagements for three years as follows: the first four at £5 a week, and the second four at £4 per week, and the third four at £3 per week. The plaintiff sent in her portrait to the defendant which was published and she received sufficient ballots to entitle her to a place among the fifty. The defendant on the 4th January, by letter, made an appointment to meet the plaintiff and the forty-nine others who had received the most ballots in London on 6th January. This letter was delivered at the plaintiff's address in London on the 5th January and was forwarded to the plaintiff who was then in Dundee, and the notice did not reach her until the 6th January, too late to enable her to be present on the 6th January. The other 49 ladies attended on the 6th January and from them defendant made his final selection of the twelve. The plaintiff made subsequent ineffectual attempts to obtain another appointment. The jury found, in answer to a question put to them by the court, that the defendant did not take reasonable means to give the plaintiff an opportunity of presenting herself for selection, and assessed the damages of the plaintiff at £100 for which amount Pickford, J., who tried the action gave judgment in favour of the plaintiff. This judgment the Court of Appeal (Williams, Moulton, and Farwell, L.JJ.), declined to disturb though conceding that in the circumstances it was hard to find any specific measure of damages, They, however, held that the breach involved a monetary loss and that it was a matter for the jury to assess the damages as best they could, and Farwell, L.J., says if the jury had given only 1s. the court could not have interfered.

ALIMONY—MISCONDUCT OF WIFE.

Leslie v. *Leslie* (1911) P. 203. In this case a decree had been pronounced for restitution of conjugal rights which the husband had disobeyed whereupon the wife applied for an order for permanent alimony. The defendant resisted the application on the ground that the wife had been guilty of fraud for which she had suffered imprisonment and that she had been guilty of fraud before marriage which had greatly disappointed his expectations and that by her fraud after marriage he had been involved in heavy losses. It appeared that the wife had no means of support and that the husband had an income of £1,500 a year. The President remarks that the origin of the wife's right to alimony was the right which the husband had upon the marriage to all the property of the wife, and that the legislation of the last

generation has deprived the husband of his complete rights to his wife's property; but that his obligation to provide for her maintenance in proportion to his ability to do so remains upon grounds which are broader and deeper. He, therefore, held that the wife was entitled to alimony notwithstanding her bad conduct and on a reference it was fixed at £3 per week.

CONFLICT OF LAWS—POWER OF APPOINTMENT—GENERAL POWER UNDER ENGLISH SETTLEMENT—DONEE OF POWER DOMICILED DUTCHWOMAN—WILL IN DUTCH FORM—LIMITED POWER—ENGLISH LAW—DUTCH LAW—EFFECT OF EXERCISE OF POWER BY DUTCHWOMAN.

In re Pryce, Lawford v. *Pryce* (1911) 2 Ch. 286. In this case an English lady under the will of her father had a general power of appointment over funds in England. She married a Dutchman and acquired a Dutch domicile. According to Dutch law she had only a right to make an absolute disposition of seven-eighths of her property, her mother, in the events which had happened, being entitled to the remaining one-eighth as her "legitimate portion." In exercise of the power, the lady made a will in Dutch form which was admitted to probate in England, whereby she appointed her husband sole executor and bequeathed to him as her sole heir the whole of her estate of which the law in force at the time of her death allowed her to dispose of in his favour. According to Dutch law the exercise of the power had the effect of making the appointed property her assets for all purposes. Parker, J., in these circumstances held that by English law also the exercise of the power had made the appointed property assets of the testatrix for all purposes; but that her power of disposition of that property was no greater than it was over property to which she was absolutely entitled; and consequently that the husband was only beneficially entitled to seven-eighths of the appointed property, and the Court of Appeal (Cozens-Hardy, M.R., and Buckley, and Kennedy, L.JJ.), affirmed his decision.

MORTGAGOR AND MORTGAGEE—NOTICE BY MORTGAGEE TO PAY OFF—FAILURE TO PAY ON DATE NAMED—SUBSEQUENT TENDER IMPROPERLY REFUSED — MORTGAGEE'S RIGHT TO SIX MONTHS' NOTICE OR SIX MONTHS' INTEREST—INTEREST SUBSEQUENT TO TENDER.

Edmondson v. *Copland* (1911) 2 Ch. 301. This was a redemption action. The mortgagee gave notice to the mortgagor

to pay off the mortgage debt and that in default of payment within three months the mortgagee would proceed to sell the property. Before the expiration of the three months some correspondence took place as to the execution of the reconveyance and the matter was not completed before the expiration of the three months, but a week later the mortgagor tendered the money which the mortgagee refused to accept claiming either six months' notice of payment, or six months' interest. The mortgagor then commenced the present proceedings for redemption and a reference to take the account was ordered. The Master certified the amount due at the date of the tender and that the tender was sufficient and had been improperly refused, and he therefore disallowed interest subsequent to the tender. On appeal from his ruling, Joyce, J., held that the tender was good, and that the mortgagee, in the circumstances, was entitled neither to six months' notice or six months' interest in lieu of notice, but inasmuch as it was not affirmatively shewn that the money, after the tender, was lying idle, the mortgagor, notwithstanding the tender, was liable to pay interest up to the date of payment, as during the meantime he had had the use of the money.

SOLICITOR—COSTS—CHARGING ORDER—PROPERTY RECOVERED OR PRESERVED—SOLICITORS' ACT, 1860 (23-24 VICT. C. 127) S. 28—R.S.O. C. 324, S. 21).

In re Cockrell's Estate (1911), 2 Ch. 318. In this case, which was for administration, a sale of part of the estate had been conducted by the defendants under the order of the court and £400 realised. On further consideration it had been ordered that the sum of £64 due by the defendants should be set off pro tanto against their costs and that the residue of their costs should be paid out of the estate. The defendant was in poor circumstances and unable to pay any costs, and his solicitor now applied for a charging order on the £400 for the costs incurred in realizing that fund (see R.S.O. c. 324, s. 21) but Neville, J., while conceding that the rights of a solicitor to a lien for costs are not in all cases necessarily merely co-extensive with the rights of his client, considered that the granting of a charging order is discretionary, and that it would not be a proper exercise of discretion to grant it in the present instance, as the costs in question had by the direction for set off already, in effect, been ordered to be paid out of the fund, and that it would not be

proper to order payment of the same costs twice out of the same fund. He therefore refused the application.

TRADE UNION—OBJECTS OF TRADE UNION—RULES—COMPULSORY LEVIES ON MEMBERS OF UNION TO OBTAIN REPRESENTATION ON MUNICIPAL COUNCILS—ULTRA VIRES.

Wilson v. *Amalgamated Society of Engineers* (1911) 2 Ch. 324. This was an action by the member of a trade union to restrain the union from making compulsory levies on the members for funds wherewith to secure representation on municipal councils. Parker, J., who tried the action came to the conclusion that the decision in *Amalgamated Society of Railway Servants* v. *Osborne* (1910) A.C. 87 where the House of Lords held that such levies could not be lawfully made for securing representation in Parliament, applied, and he therefore granted an injunction as prayed, and the rules of the union authorizing such levies were declared to be *ultra vires* of the union.

WILL—CONSTRUCTION—GIFT TO SUPPOSED WIFE DURING HER WIDOWHOOD—BIGAMOUS MARRIAGE.

In re Hammond, Burniston v. *White* (1911) 2 Ch. 342 is a case involving a peculiar state of facts. The plaintiff Burniston's husband disappeared in 1894 and was supposed to have been drowned, though it was impossible to trace him. In the year 1900 she married John Hammond who was informed of the disappearance of her husband, and both believed that they were lawfully married, and they lived together as man and wife until 1906, when Hammond died and by his will gave his household effects to his "wife" "during her widowhood and after her decease or second marriage" he gave them to his daughters. He also gave his wife the use of a house, and an annuity on the same terms. After the testator's death the plaintiff lived in the house and received the annuity until 1910, when it was discovered that her husband Burniston was alive. In these circumstances, she brought the present action for a declaration that she was the person described in Hammond's will as his wife, and was entitled to all the rights and benefits given by the will to his wife. Parker, J., who tried the action gave judgment in her favour holding that the words "during widowhood" did not import a condition, but simply pointed out the time within which the gift was to be enjoyed, and he held that during widowhood meant until the donee died or married again.

REPORTS AND NOTES OF CASES.

England.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Viscount Haldane, Lords Macnaghten, Mersey and Robson.] [May 23.

ATTORNEY-GENERAL FOR CANADA *v.* STANDARD TRUST COMPANY OF NEW YORK.

Company—Directors—Sale by, to company—Directors the only persons interested—Fiduciary position.

This was an appeal by special leave from the judgment of the Supreme Court of Canada (IDINGTON, J., dissenting), from the Exchequer Court. The respondent company was the assignee of the syndicate referred to in the judgment. All the shares in the company belonged to the directors, there being no outside shareholders. The directors made a sale of property without obtaining the approval of the transaction by the shareholders.

Held, that this sale, not being in itself ultra vires, should not be set aside on the ground that the directors held a fiduciary position and that the transaction was not approved at a general meeting, the directors themselves being the only persons interested.

Hon. F. Russell, K.C., and *A. Geoffrion*, K.C., of Quebec Bar, for the appellants. *Buckmaster*, K.C., *Martin*, K.C., of Quebec Bar, and *Hon. M. Macnaghten*, for the respondent.

Province of Ontario.

HIGH COURT OF JUSTICE.

Boyd, C.] KENNEDY *v.* SPENCE. [Sept. 29.

Vendor and purchaser—Contract—Vendor only able to convey one-half—Specific performance—Husband and wife.

Action for specific performance of a contract for the sale and purchase of land. The contract was made by the husband for

the sale of a parcel of land of which he owned one-half, and his wife the other half. The wife refused to convey her portion and the action was brought by the purchaser against the husband, the vendor, to enforce the sale of the whole property. The purchaser was not aware, till late in the proceedings, the condition of things, but he was then willing to accept all the vendor could give with a corresponding abatement in price. The defence was that the vendor could convey only one-half the land.

Held, that the purchaser was entitled to the conveyance of the portion that the defendant could give him, the price to be abated accordingly.

R. H. Greer, for plaintiff. C. A. Moss, for defendant.

Boyd, C.] [Sept. 29.

TORONTO AND NIAGARA POWER CO. *v.* TOWN OF NORTH TORONTO.

Municipal corporations—Electric power company—Authority to erect poles and wires in streets of town without permission —Construction of statutes—"Enter"—"Incommode"—Application to Dominion railway board—Necessity for depositing plan and book of reference—Condition precedent.

Action to restrain the defendants from interfering with the plaintiffs' operations in erecting poles and transmission wires in the town of North Toronto, and for damages.

The plaintiffs claimed to have a free hand to erect a line for the transmission of high electric power along the streets of North Toronto, without the sanction or supervision of any municipal or other body. The defendants contended: (1) that there was no power whatever conferred by the plaintiffs' charter to enter and break ground in the street; (2) that, if there was such power, it cannot be exercised without the permission of the municipality; and (3) that the exercise of such power of construction should be supervised by some competent authority outside of the company, in the interests of public safety, and in order to avert probable injury to life and property. . . .

BOYD, C.:—After speaking of the corporate power under the Act, the Chancellor referred to other legislation: the Dominion Telegraph Company's Act of 1871, 34 Vict. c. 52, s. 4; Bell Telephone Company's Act of 1880, 43 Vict. c. 67, s. 3; Montreal Telegraph Company's Act of 1882, 45 Vict. c. 93, s. 3 and continued:

In the Act incorporating the plaintiffs, 2 Edw. VII. c. 107, the collocation of words as to the powers of the company is different, but not less comprehensive: thus (sec. 12), the company may construct, maintain, and operate works for the . . . distribution of electricity and power . . . and may construct, maintain, and operate lines of wire, poles, tunnels, and other works, in the manner and to the extent required for the corporate purposes, and may with such lines of wire, poles, etc., conduct, convey . . . such electricity . . . through, over, along or across any public highway . . . and may enter upon any lands on either side of such lines and fell and remove any trees . . . or other obstructions. . . . And the company may enter upon private property and survey and set off such parts as are necessary (making compensation therefor) under the provisions of the Railway Act of 1888, thereinafter referred to. And by section 13, the company may erect poles, construct trenches, and do all other work for the transmission of power, provided the same are so constructed as not to incommode the public use of the streets or to impede access to houses in the vicinity.

Under the words of the Bell Telephone Act it was held by the highest court that the power existed and was exercisable without the sanction of the municipal bodies in whom the highways were vested: *City of Toronto* v. *Bell Telephone Co.*, [1905] A.C. 52. The words of the Bell Telephone Company's Act, "construct, erect, and maintain" are equipollent with these of present Act, which are: "Construct, maintain, and operate" lines of wire and poles and therewith convey power through, over, along, or across any public highway.

The words "enter" is used in these empowering Acts uniformly, so far as I can see, with reference to an entry on private lands, whereas "construct" is used as to the operation on public places. In the absence of words of restriction, the meaning is to give absolute power to go upon the highway for the purposes of their undertaking without permission from the municipality. The words used as to the powers of the company are to be read giving them their fair and ordinary meaning; and my conclusion is that the only condition imposed by this charter is, that the work of construction shall be so conducted as not to incommode the public use of the streets or to impede access to buildings close-by the streets.

"Incommode" is a limited word and does not appear to have

reference to the dangers arising from the subsequent transmission of the power, but to inconveniences in the actual placing of the plant on the public sites. That is a matter to be adjusted pending construction, and is fully met in this case by the undertaking given that the line shall be put up under the supervision and with the approbation of the Dominion Railway Board (a body not in existence when the charter was obtained from Parliament). That Board will also, doubtless, have careful regard to the element of danger to life and property liable to arise from the stringing overhead of high voltage transmission wires.

In the next place, the company also claim the right to proceed without filing plans and surveys of the proposed route. Of this I have more doubt. The Act, sec. 18, provides that the company may take and make surveys and levels of the lands through which the works are to pass or to be operated, and of the course and direction of the works and of the lands intended to be passed through "as far as then ascertained," and also the book of reference for the works, and deposit the same as required by the Railway Act (1888) with respect to plans and surveys of a section of the works . . . and upon such deposit of the map or plan and book of reference of any such portion, all the sections of the said Railway Act applicable thereto shall apply.

Though this reads that the company "may" do this, it means that they shall do so in order to bring their corporate powers into proper activity and efficiency. And when one needs the interpretation to be given to the word "lands" as meaning or including "privilege or easement" (s. 21 of the charter, sub-s. (*c*)), it appears to me to extend the provision as to maps and book of reference to this passage of the line along the highway in question. The statute itself concedes or grants the easement or privilege of passing "through, over, along, or across any highway:" this work is intended to pass "through" the highway (on its surface, that is), and the propriety of plans, surveys, and the like seems as great for this method of construction as if private lands were alone in question.

The special Act (s. 21) incorporates s. 90 of the general Railway Act, 51 Vict. c. 19. That section provides (*a*) that the company may enter into or upon any lands of Her Majesty without any previous license therefor . . . and make surveys and examinations and ascertain such parts as are necessary and proper for the line. It may be that this can be read as applicable to highways which are vested in the Crown as to the freehold;

and, if so, the language is pertinent to both aspects of the case in hand, i.e., the company can enter without getting leave, but it is not absolved from preparing proper plans for public notification of what is being proposed to be done.

Sec. 145 of the general Act (also incorporated) enacts that the deposit of map, plan, and book of reference shall be deemed a general notice to all parties of the lands (i.e., privilege or easement) which will be required for the line.

The sections of the Railway Act of 1888 applicable to maps and plans are also in general terms incorporated with the special Act (s. 18). These sections are from 123 to 131, as now important. By s. 124, the map, plan, and book of reference are to be deposited at the Department of Railways and are to be examined and certified by the Minister and transmitted to the different localities interested; any person may resort to and take copies of these documents (s. 126); and, by s. 134, till such original documents have been so deposited, the construction of the line shall not be proceeded with.

Had this public notice been given, it would have been open for the authorities of the defendants to have intervened before the Minister or otherwise, and have pointed out the obvious dangers likely to arise from the proposed method of construction over the local electric lines of the defendants. At present, without some safeguard of preliminary character, the company assert the right to go off-hand on the ground, place the poles over the line of the defendants without notification or supervision of any kind, public or private. The Bell Telephone Act provides for the sanction of the municipal authorities in cities, towns, and villages as to the height of the poles and the affixing of the wires, as to the number of lines of poles along the streets of a town, and as to not duplicating poles along the same side of a street, and the like safeguards, which are conspicuously omitted from the Act of 1902. It cannot be because the danger of electrical transmission is being lessened by the efflux of time, but perhaps because there was not sufficient vigilance exercised during the passage of this Act in the interests of public safety.

According to the best opinion I can form, the law requires the deposit of plan and book of reference as a condition precedent to the beginning of construction: that this being done, there is no permission required for the occupation of the public streets. It may be that the municipality will waive the deposit of plans, on the undertaking of the company to have the method

of construction approved of by the Railway Board; and in that case the deposit may be made nunc pro tunc and the prosecution of the work not unduly delayed. For this reason, also, I have perhaps expedited overmuch the giving of judgment, but it is best for both parties to know where they are as soon as possible.

D. L. McCarthy, K.C., for plaintiffs. *T. A. Gibson*, for defendants.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] [Sept. 25.

HILL *v.* WINNIPEG ELECTRIC RY. CO.

Negligence—Accident caused by negligence of servant of defendants—Common carriers—Duty to carry passengers safely.

While the plaintiff was being conveyed as a passenger on a car of the defendants, he was injured in consequence of the car being run into from behind by another car on the same track. The motorman and conductor of the other car had, contrary to the express rules of the company, exchanged places, and the conductor in operating the car, either through negligence or incompetence, allowed the collision to take place.

Held, that the negligence of the motorman in abandoning his post to the conductor was the effective cause of the accident, and that the defendants were liable in damages for the injury to the plaintiff, although the conductor, whose act was the immediate cause of the accident, was not acting within the scope of his employment at the time.

Englehart v. *Farrant*, [1897] 1 Q.B. 240, followed. *Gwilliam* v. *Twist*, [1895] 2 Q.B. 84; *Beard* v. *London*, [1900] 2 Q.B. 530; *Harris* v. *Fiat*, 22 T.L.R. 556 and 23 T.L.R. 504, distinguished.

Held, also, *per* PERDUE, J.A., that in order to make the defendants as carriers of passengers by railway liable to the plaintiff, it was enough to shew that the negligence or omission which caused the accident was that of the defendants' servants then in actual charge of the car.

Wright v. *Midland Ry. Co.*, L.R. 8 Ex. 137; *Thomas* v. *Rhymney Ry. Co.*, L.R. 6 Q.B. 266, and *Taylor* v. *Manchester*,

etc., Ry. Co., [1895] 1 Q.B. 134, followed. *Vance* v. *G.T.P. Ry. Co.*, 17 O.W.R. 1000, distinguished.

Cohen, for plaintiff. *Anderson*, K.C., and *Guy*, for defendants.

Full Court.] BUCHANAN *v.* WINNIPEG. [Oct. 9.

Costs—Reference to Master and further directions.

The limitation of costs provided for by s. 1 of c. 12 of 7 & 8 Edw. VII. applies to all costs up to and inclusive of the final determination of the action in the Court of King's Bench, and, although there has been an expensive trial followed by a reference to the Master and a hearing on further directions, the costs of all of which were given to the plaintiff and, as ordinarily taxable, would largely exceed said limit, the taxing officer could not, without such a certificate from the trial Judge as that section requires, allow the plaintiff in all more than $300 and disbursements.

Deacon, for plaintiff. *Blanchard*, for defendants.

Full Court.] [Oct. 10.

HANNESCHOTTIR *v.* BIFROST.

Taxes—Unpatented land—Sale of land after issue of patent for taxes imposed before issue.

Appeal from judgment of METCALFE, J.. noted ante p. 314, dismissed with costs.

Full Court.] [Oct. 10.

BANK OF MONTREAL *v.* TUDHOPE.

Bank Act. R.S.C. 1906, *c.* 29, *ss.* 86-88—*Sale of goods by pledgor in ordinary course of business — Assignment of chose in action—Set off.*

Appeal from judgment of ROBSON, J., noted ante p. 279, dismissed with costs.

Full Court.] [Oct. 10.

GRACE *v.* OSLER.

Building contract—Damages for delay in completion—Termination by owners of the employment of contractor before completion — Liability of contractor for results of accident caused by his negligence.

Appeal by plaintiff from the judgment of MATHERS, C.J. K.B., noted ante, p. 237.

Held, 1. The defendants, by requiring a complete change in the character of a portion of the work, by ordering a number of important extras after the time fixed for completion, by great delays on the part of their architect in furnishing drawings and specifications of required changes and in other ways disentitled themselves to claim anything whatever against the plaintiffs for damages for delays in completion.

2. The defendants could not recover anything in respect of the floors having been left uneven by the plaintiffs because they chose to complete the building without restoring the level as they might have done; although, if they had restored the level, they might have recovered the cost of the work from the plaintiffs.

In other respects, the decision of the trial judge was affirmed.

Minty and *C. S. Tupper*, for plaintiff. *Munson*, K.C., and *Haffner*, for defendants.

Full Court.] McKENTY *v.* VANHORENBACK. [Oct. 10.

Bills of exchange and promissory notes—Issue and delivery of —Stolen cheque—Holder in due course.

Delivery or issue, intending it to be used, of a cheque on a bank for a sum of money payable to A. B. or bearer, although signed by the drawer and complete in form, is, under ss. 39, 40 (2) and sub-s. (*f*) and (*i*) of s. 2 of the Bills of Exchange Act, R.S.C. 1906, c. 119, an essential element in the liability of the drawer to one who afterwards cashes it. Defendant had signed such a cheque and left it in his desk from which it was stolen.

Held, that he was not liable upon it to the plaintiff who had cashed it.

Arnold v. *Cheque Bank*, 1 C.P.D. 584; *Baxendale* v. *Bennett*, 3 Q.B.D. 531, and *Smith* v. *Prosser* (1907), 2 K.B. 735, followed. *Ingham* v. *Primrose*, 7 C.B.N.S. 82, not followed.

Deacon, for plaintiff. *H. V. Hudson*, for defendant.

Full Court.] AFFLECK *v.* MASON. [Oct. 10.

Practice—Interrogatories—Relevancy of—King's Bench Act, Rule 407B and 5 & 6 Edw. VII. c. 17.

The pleadings in this case raised an issue whether or not the plaintiff, in order to induce the defendants to enter into the

agreement sued on, falsely represented to them that, by virtue of his own interest and the interest of others represented by him, he controlled a certain company and could determine whether the company would accept the defendants' offer or not. A letter had been written by the plaintiff to one of the defendants before the acceptance of the offer in which he spoke of other parties as interested in the sale and holding out for a larger sum.

Held, RICHARDS, J.A., dissenting, that interrogatories put by the defendants to the plaintiff, under Rule 407B added to the King's Bench Act by 5 & 6 Edw. VII. c. 17, s. 2, asking for information as to the names of the other parties referred to, and as to all communications between them and the plaintiff relating to the proposed sale, were relevant to the issue and should be fully answered.

A. B. Hudson, for plaintiff. *Wilson*, K.C., and *W. C. Hamilton*, for defendants.

Full Court.] DAVIS *v.* WRIGHT. [Oct. 23.

Verdict of jury—Costs—New trial.

The jury at the trial of an action has nothing to do with costs and if they bring in an verdict clearly stated to be for damages and costs, which is accepted and acted upon by the judge, the judgment should be set aside and a new trial ordered. *Poole* v. *Whitcomb*, 12 C.B.N.S. 770, and *Kelly* v. *Sherlock*, L.R. 1 Q.B. at p. 691, followed.

Costs are now entirely in the discretion of the trial judge, no matter what is the amount of the verdict for the plaintiff. *Shillinglaw* v. *Whillier*, 19 M.R. 149, followed.

Wilton and *Davidson*, for plaintiff. *Blackwood* and *Tench*, for defendant.

Full Court.] KING *v.* BOND. [Oct. 23.

Criminal law—Criminal Code, s. 793—Summary trial of indictable offence—Taking the evidence in shorthand—Certiorari.

Held, 1. The Criminal Code contains no provision as to how the evidence of witnesses at the summary trial of an indictable offence shall be taken down, and a conviction entered by

the magistrate will not be quashed on certiorari, because the evidence was taken down by a shorthand reporter.

2. Sec. 793, providing that the magistrate shall transmit the depositions of the witnesses to the proper officer, does not by inference require that the depositions must be taken in longhand by the magistrate himself.

P. E. Hagel, for prisoner. *Graham,* D.A.G., for the Crown.

Full Court.] [Oct. 23.

WATERLOO MANUFACTURING CO. *v.* KIRK.

Chose in action—Assignment of—Money received by defendant for the use of plaintiff.

A directed B, his debtor, in writing to pay the money to C, and directed C. to pay the money when collected to his creditor D. C. undertook to do so and received the money from B, and informed D. that he had collected a sum of money for him, although the sum he mentioned was not the full amount which he had actually collected.

Held, that there was a complete assignment in equity by A. to D. of the money actually collected from B. to C., and that D. could recover the full amount in an action directly against C. *Morrell* v. *Wootten,* 16 Beav. 197, and *Lilly* v. *Hayes,* 5 A. & E. 548, followed. *Williams* v. *Everett,* 14 East 582, distinguished.

Foley, for plaintiff. *McLeod,* for defendant.

Full Court.] GRAVES *v.* TENTLER. [Oct. 23.

Arbitration and award—Finality of award—Reservation of matter for subsequent adjudication by arbitrator—Award good in part and bad in part—Jurisdiction—Enforcing award against non-resident—Service of notice of motion out of jurisdiction.

Appeal from decision of PRENDERGAST, J. noted ante, p. 152, allowed on the ground that there was no finality in the award, the arbitrator having reserved the right to himself to allow the plaintiff a further sum of $800 at the expiration of

thirty days, unless the defendant should within that time produce satisfactory evidence against it. An award which is bad in part, can only be held good as to the remainder of it when the bad part is clearly separable from the good: Russell, pp. 214, 216; *Stone* v. *Phillips*, 4 Bing. N.C. 87.

Fullerton and *Foley*, for plaintiff. *Affleck*, for defendant.

KING'S BENCH.

Robson, J.] [Oct. 2.

EMPIRE SASH COMPANY *v.* MARANDA.

Fraudulent preference—Insolvency, what constitutes—Security valid as regards fresh advances, though void as regards existing debt—Pressure by creditor—Bills of Sale and Chattel Mortgage Act, R.S.M. 1902, *c.* 11—*Pleading—Chattel Mortgage—Simple contract creditor.*

Held, 1. A debtor should be held to be "in insolvent circumstances" within the meaning of s. 40 of the Assignments Act, R.S.M. 1902, c. 8, if he does not pay his way and is unable to meet the current demands of his creditors and if he has not the means of paying them in full out of his assets realized upon a sale for cash or its equivalent, or when he is not in a condition to pay his debts in the ordinary course as persons carrying on trade usually do. *Warnock* v. *Kloepfer*, 14 O.R. 288, 15 A.R. 324, 18 S.C.R. 701, and *Shone* v. *Lucas*, 3 D. & R. 218, followed.

2. Under s. 42 of the Act, a security for a debt given to a creditor which has the effect of giving him an advantage over other creditors will be declared void, notwithstanding that it has been secured by pressure on the part of the creditor and whether or not the creditor knew of the debtor's insolvency.

3. Under s. 44 of the Act, a chattel mortgage security given to a creditor for an existing debt and also to cover fresh advances, although void as to the existing debt as being a fraudulent preference, should be held good as regards any fresh advances made to the debtor on the strength of it. *Mader* v. *McKinnon*, 21 S.C.R. 645, and *Goulding* v. *Deeming*, 15 O.R. 201, followed.

4. A simple contract creditor cannot make an attack upon a chattel mortgage under the Bills of Sale and Chattel Mortgage Act, R.S.M. 1902, c. 11, although his action is brought on behalf of himself and all other creditors, one of whom may be an execution creditor. *Parks* v. *St. George,* 10 A.R. 496, and *Hyman* v. *Cuthbertson,* 10 O.R. 443, followed.

5. When the plaintiff's statement of claim is based entirely upon the provisions of the Assignments Act, it is a departure in pleading to set up in the reply a case based upon the Bills of Sale and Chattel Mortgage Act and such case should not be recognized: Odger on Pleading, 6th ed., 249, 250.

Haffner, for plaintiff. *Dennistoun,* K.C., and *Locke,* for defendants.

Mathers, C.J.] [Oct. 4.

STRATHCLAIR *v.* CANADIAN NORTHERN RY. CO.

Railway Commissioners for Canada, Board of—Making order of, a rule of court—Vagueness and uncertainty in language of order.

An order of the Board of Railway Commissioners for Canada requiring a railway company to put a highway "in satisfactory shape for public travel" should not be made a rule of this court under section 46 of the Railway Act, R.S.C. 1906, c. 37, on the application of the municipality interested, because the wording of it is too vague and uncertain to permit of its enforcement afterwards if made such a rule. A court of equity would not decree specific performance of an agreement couched in such vague terms and the cases are analogous.

Taylor v. *Partington,* 7 DeG. M. & G., referred to.

A. B. Hudson, for applicants. *Clark,* K.C., for the railway company.

Macdonald, J.] [Oct. 5.

GAS POWER AGE *v.* CENTRAL GARAGE COMPANY ET AL.

Pleading—Joinder of defendants—Joinder of cause of action arising out of tort with one arising out of contract.

A plaintiff may, under the present system of pleading, proceed in the same action against one defendant for a breach of a contract and against other defendants for maliciously and wrongfully procuring and inducing the breach, there being such

a unity in the matters complained of as entitles the plaintiff to join all the defendants. *Kent Coal Exploration Co.* v. *Martin*, 16 T.L.R. 486, and *Evans* v. *Jaffray*, 1 O.L.R. 614, followed. *Sadler* v. *Great Western Ry. Co.*, [1896] A.C. 450; *Gower* v. *Couldridge et al.*, [1898] 1 Q.B. 348, and *Thompson* v. *London County Council*, [1899] 1 Q.B. 840, distinguished.

Burbidge, for plaintiff. *Armstrong*, for defendants.

Mathers, C.J.] GRIFFIN *v.* BLAKE. [Oct. 18.

Practice—Substitutional service—Publication of notice by advertisement—Motion for final judgment.

Held, 1. Substituted service by publication of notice by advertisement of a statement of claim, especially in an action in which the plaintiff seeks to deprive the defendant of a possible interest in land, should not be ordered, under Rules 182 and 183 of The King's Bench Act, except upon affidavit shewing a reasonable probability that the advertisement will come to the knowledge of the defendant. *Hope* v. *Hope*, 4 De. G. M. & G. 328; *Furber* v. *King*, 29 W.R. 534; *Alexander* v. *Alexander*, 1 O.L.R. p. 43, and *Howard* v. *Lawson*, 19 M.R. 223, followed.

2. The court will not pronounce final judgment in such a case, notwithstanding that the Referee has made an order not appealed from permitting the plaintiff to sign interlocutory judgment after publication of notice, unless, upon an examination of the material filed, it appears that the order had been properly made: *Howard* v. *Lawson*, supra.

Deacon, for plaintiff.

Bench and Bar.

JUDICIAL APPOINTMENTS.

John Malcolm McDougall, K.C., of the city of Hull, Province of Quebec, to be puisne judge of the Superior Court in the Province of Quebec, in the room of Hon. Mr. Justice Champagne, deceased.

Book Reviews.

Leake on Contracts. Sixth edition, with Canadian Notes. By The Hon. Mr. Justice Russell. London: Stevens & Sons, Limited. Toronto: Canada Law Book Company, Limited.

The perusal of an advanced copy of this new edition of the standard work on the Law of Contracts shews that the English and Canadian cases have been carefully brought up to date, the former by Mr. A. E. Randall, of the English Bar, and the latter by the Hon. Mr. Justice Russell, of Halifax, whose previous legal compilations have been favourably received by the Canadian Bar.

The first edition of Leake on Contracts appeared in 1867, and such has been the demand for the book that, notwithstanding the issue of large editions from time to time, the five editions which had previously been issued in England had become exhausted. The inclusion of Canadian Notes in the present edition adds much to its value in Canada, and makes it the first Canadian edition of any work on the law of Contracts having the scope of this book.

The usual subdivisions of the subject are followed and include the Formation of Contract, the Consideration, the Parties, the Promise, the Statute of Frauds, Contracts under Seal, Oral Contracts, Contracts in Writing, Breach of Contract, Assignment, Discharge and Performance. Under these general headings are included the principles as to Accounts stated, Acknowledgment of debt, Arbitration, Auctions, Bailment, Building Contracts, Carrier's liability, Company's shares, Capacity of corporations, Covenants running with the land, Measure of damages, Misrepresentation and Fraud, Insurance, Limitations of actions, Contracts for personal service, Partnership, Suretyship, Agency, and Sale of Goods and of Lands.

This edition includes, without any abridgment, the whole of the English edition of over nine hundred pages, and is particularly to be commended because the principles of contract law are set forth in the text without undue recital of the circumstantial details of the decisions from which the principle is extracted. At the same time ample references have been given in the footnotes to all of the leading cases which can be cited in support of the principles stated in the text. The year of the decision

appears with the name of the case throughout. We know of no better book on the Law of Contracts and can heartily recommend it to the profession in Canada.

Flotsam and Jetsam.

We copy from the *Law Notes* (U.S.) the following extracts from reports, which are rather amusing reading:—

IT MIGHT HAVE BEEN EXPECTED.—In Cottrell v. Fountain, (N.J.) 77 Atl. Rep. 465, an action for assault and battery, the plaintiff sued for damages because he had been soaked with water by the defendant, Asbury Fountain.

EVEN VIOLENCE COULDN'T MOVE THEM.—"Notwithstanding the earnest, almost violent, argument of learned counsel, we adhere to our former opinion," etc. *Per* Root, J., in Hall v. Baker Furniture Co., 86 Neb. 389.

HOW THEY SETTLE THE LAW IN INDIANA.—"It is settled law that securities held by a surety for the payment of a debt are held by him for the payment of the debt." *Per* Olds, C.J., in Huffmond v. Bence, 128 Ind. 136.

UNNECESSARY HOMICIDE.—In Texas, a man who kills his wife by shooting her three times with a double-barrelled shotgun is guilty of "a cruel and very unnecessary homicide." See Fletcher v. State, 138 S.W. 109.

THE RACE IS TO THE SWIFT.—The familiar Old Testament declaration (Ecclesiates ix. 11.) that "the race is not to the swift" meets with flat contradiction in the case of Strode v. Swim, 1 A.K. Marsh. (Ky.) 366. Strode won.

A NEW SUBJECT OF EXPERT DISAGREEMENT.—"Eminent lawyers have been called by both parties to testify as experts. But no two of them agree in their definition of privies." *Per* Rugg, J., in Old Dominion Copper Mining, etc., Co. v. Bigelow, (Mass.) 89 N.E. Rep. 217.

UNITED STATES AS PART OF NEW YORK.—In Wertheim v. Chicoutimi Pulp Co., [1911] A.C. at page 316, Lord Atkinson of the House of Lords observes: "On the authority of the three cases cited from the reports of the State of New York, namely, Grand Tower Co. v. Phillips, 90 U.S. 471," etc. Thus does the Empire State gain distinction abroad as well as at home.

CONFUSION!—In Oyster v. Oyster, 32 Mo. App. 270, it was held that an ouster of an Oyster who was the head of a family included an ouster of all the other Oysters in the family, and that if, after the Oysters had been ousted, any one of the ousted Oysters sowed crops on the land, such crops might be replevied from the ousted Oyster by the person who ousted the Oysters, and—well, what's the use?

ONOMASTIC REMARKS.—Some strange names of litigants appear in the federal reports of cases coming from the Philippine Islands. In 31 S. Ct. 423 we find "Go-Tiongco," and in 205 U.S. 403, "Go Tauco." We were about to suggest respectfully to our little brown brothers to whom we gave the Philippine Bill of Rights from our own revered Constitution that they keep Mr. "Go-Tohell" from shocking us in print, when it occurred to us that they might easily retaliate by introducing us to Mr. "Moose Dung" in 175 U.S., p. 3.

A MODEST WITNESS.—The lawyer had a somewhat difficult witness, says a writer in the Milwaukee *Journal*, and finally asked if he was acquainted with any of the men on the jury.

"Yes, sir," replied the witness, "more than half of them."

"Are you willing to swear that you know more than half of them?" demanded the lawyer.

"Why, if it comes to that, I'm willing to swear that I know more than all of them put together."

Many are the stories they tell at Manchester of Judge Parry, whose appointment to another court is much regretted. Perhaps the best of the bunch is the one which shews how his keen desire to do justice was appreciated by working men. One day, as he was going away from the court, he passed two men who were discussing, wholly unconscious of the fact that they were overheard, the decision he had just given against them. "Well, 'ow on earth 'e could do it I don't see, do you, Bill?" said one. "'E's a fool," said the other. "Yes, 'e's a fool, a —— fool, but 'e did 'is best." "Ay, I think 'e did 'is best."—*Law Notes.*

Counsel (to the jury): "The principal fault of the prisoner has been his unfortunate characteristic of putting faith in thieves and scoundrels of the basest description. I have no more to say. The unhappy man in the dock, gentlemen of the jury, puts implicit faith in you!" Old, we fear, but it bears repetition.—*Law Notes.*

EMPLOYERS' LIABILITY.—When a few years ago British employers became liable at law for injuries suffered by employees in the course of their work, says the New York *Sun*, cartoonists got busy depicting the hired girl gleefully tumbling down stairs with the tea tray or the coal box, secure in the prospect of a long rest and no loss of wages. Householders, of course, cover their risk by insuring each employee against accidents. English courts as a rule place a liberal construction on the word "accident," and accordingly on the books of the insurance companies may be found many odd claims. Here are a few:—

A cow whisking her tail caused injury to a milkmaid's eye.

A farm hand was stung by a bee.

A manservant sprained his leg through stamping on a rat.

A coachman coming out of a stable was struck on the face by his masters' boot, intended for a caterwauling cat.

A cook was breaking coal and a piece went down her throat.

A curate was scalded through stumbling while carrying a tea urn at a parochial gathering.

A servant was pricked by a rusty needle while sewing on a button on her employer's clothing.

It is somewhat difficult to imagine that success could attend claims like these:—

A servant received a shock through seeing a large Teddy bear when the room was only dimly lighted.

Another servant fetching coal out of a cellar collapsed from fright caused by the silent appearance of a washerwoman, and broke her arm.—*Case and Comment.*

It was the opinion of Sir James Fitzjames Stephen that criminals were excellent critics of sentences and could estimate accurately what was the appropriate punishment for their offence. Mr. Wallace, K.C., perhaps agrees. The other day he sentenced an old gaolbird, who had pleaded guilty to a burglary, to twenty-three months' imprisonment with hard labour. "I wish you'd make it three years' penal servitude," said the prisoner, and the learned judge did, no doubt thinking that the man's own estimate of the best treatment for his case was correct. Probably the "old hand" knew that the life in penal servitude is not so severe as that of a hard labour prisoner.—*Law Notes.*

Canada Law Journal.

VOL. XLVII. TORONTO, NOVEMBER 15. No. 22.

HON. C. J. DOHERTY, MINISTER OF JUSTICE.

Under the new government at Ottawa the position of Minister of Justice and Attorney-General of Canada goes to the Province of Quebec, in the person of Hon. C. J. Doherty, K.C. The appointment has met with general acceptance, not only in his own province, but elsewhere.

The new minister was born in the city of Montreal in the year 1855. He graduated from St. Mary's College there; took his law course at McGill University, and received the gold medal for his year. His examinations shewed that he had a legal mind, and had well grasped the principles of the law. He was subsequently made a D.C.L. by his alma mater, where later he occupied the chair of Civil Law. Dr. Doherty practised law in his native city, where he held a prominent position at the Bar, and he was also a member of the Council of the Bar.

In addition to Dr. Doherty's legal training and his successful career as an advocate, the fact that he was for fifteen years a judge of the Superior Court of Quebec will be of the greatest value in the position he now occupies, for in its many-sided character the office of Minister of Justice assumes often a judicial aspect.

Mr. Doherty's appointment will personally be acceptable to the public, as he has always been public spirited and interested in other matters besides law. At one time he held a commission as captain in the 65th Regiment and served with that corps during the Northwest Rebellion of 1885. He has a fine presence, is possessed of a well cultured mind and pleasing and attractive manners. His selection by Mr. Borden as Minister of Justice will, we think, be generally considered an excellent one.

THE GRAND JURY.

The grand jury is a very ancient institution, and, when it rightly discharges its duties, plays a very important part in the administration of justice. It is selected from the men of substance of the county, and presumably from the most intelligent class of the community. Among its most important duties is the preliminary investigation of criminal cases for the purpose of seeing whether or not a fair primâ facie case exists for putting an accused person upon his or her trial.

A certain amount of odium necessarily attaches to any one from the bare fact that he has to stand a trial for an alleged criminal offence, even though it should result in his acquittal, and though the Court should declare that he leaves the dock "without a stain upon his character." For on the man himself who has passed through such an ordeal, if he is of a sensitive nature, an indelible injury has been inflicted. This just and merciful barrier which the law so rightly interposes against hasty and unwarranted accusations, it is needless to say, may be used for the purpose of shielding the guilty. It is, therefore, necessary that those who are called to the responsible position of grand jurors, should have a high sense of their duty, not only to the individual, but also to the public, and realize that while it is a solemn duty to shield the individual from the odium of an unjust prosecution, it is equally their duty to the public to be careful that no one against whom a primâ facie case of guilt is made out, escapes trial by his peers.

In order that justice may be duly administered it is desirable that grand jurors should appreciate their limitations, and should be ready to avail themselves of all the help which is necessary for the proper discharge of their duties. It cannot be expected that men even of the calibre of the average grand juror, can be skilful lawyers any more than it is to be expected that the average lawyer will be a skilful merchant or farmer, or mechanician; and for grand jurors deliberately and ostentatiously to disregard the directions of the judge holding the court to which they are

summoned, and dispense with the assistance of the Crown counsel in the investigation of cases submitted for their consideration, while it savours of conceit and self-sufficiency on the part of the jurors, at the same time also indicates the want of what is called "horse sense."

Fortunately for the administration of justice in Ontario grand juries are rarely to be met with who are wanting either in due respect for the Bench, or of that ordinary common sense which is necessary for the proper discharge of their functions.

There are, however, exceptions to every rule, and at a recent assize a grand jury signalized itself by dispensing with the services of Crown counsel in the investigation of a case in which, above all others, such assistance was imperatively necessary in order to enable them to reach a right conclusion; and when the Bench ventured to remonstrate it was met with what might be aptly termed the respectful insolence of the foreman. In such circumstances it is hardly to be wondered at that the finding of the jury resulted in what the court seemed to have regarded as a miscarriage of justice, and having thus, so far as we can gather from what has appeared in the public press, demonstrated their unfitness for the proper discharge of their important duties, the court promptly dismissed them.

There may have been reasons for the action of the grand jury which do not appear, and they may have imagined some desire to encroach upon their undoubted rights; but the unseemly incident would have been avoided if the foreman had adopted the usual course of requesting the Crown Counsel to wait upon them for his advice upon any matter of a legal character, with which he would necessarily be more familiar than they could be. Instead of this they took the matter into their own hands and, according to the views of the judge, made a mess of it. Upon the whole, we do not see that the judge could have acted otherwise than he did.

THE DIVORCE HARVEST.

We regret to see that the annual crop of divorces granted in Canada continues to increase. During the last session of the Dominion Parliament twenty-two divorces were granted, fifteen at the instances of wives, and seven at the instance of husbands. In every case but one the cause alleged is adultery; and the remaining case was for an unnameable offence. The applicants for relief are empowered to marry again, but no such permission is granted to the "guilty party."

Of the total number of twenty-two applications, twelve came from Ontario, four from Quebec, three from Manitoba, and two from Alberta. Ontario, as usual, having the unenviable position of heading the list.

It is sometimes assumed by "the guilty party" that, though not expressly authorized to marry again, he or she may nevertheless do so, and in some cases such a view has been carried into practical effect, but it yet remains to be determined whether a parliamentary divorce quoad the "guilty party" has any greater legal effect than the old divorce a mensa et thoro, which was merely a separation from bed and board and did not carry with it the right of remarriage. Those who contract such unions therefore seem to run the risk of the marriage being accounted illegal, and their offspring, if any, illegitimate.

It would seem proper that those responsible for the maintenance of public mortality should consider whether a test case should not be brought to determine the question whether or not such second marriages are lawful, in order that innocent persons may not be led into the false position of thinking themselves lawfully married if they are really not.

There can be little doubt that the primitive Christian Church regarded marriage lawfully contracted, as indissoluable for any cause whatever during the lifetime of the parties. This seems to be established by two recent English publications, one by the Rev. Dr. Wilkin, and the other by Bishop Gore, and according to these writers the better opinion of Biblical critics seems to be that the variation between St. Matthew's gospel and those of St.

Mark and St. Luke, which is supposed by some to introduce an exception to the indissoluble character of marriage in the event of the commission of adultery by the wife, is really an interpolation, in St. Matthew's gospel, made with the possible intention of making its meaning clearer, but which really had the effect of introducing an exception for which there was no authority in any primitive document, and which creates a variance between it and the other two gospels.

In this country, although, in the main, Christian principles are the foundation of social order, it is necessary for Parliament to take into account the fact that all citizens are not Christians, and many who call themselves Christians are not willing to submit themselves in all respects to what may in fact be the Church's law; and again, many Christians are not agreed as to what the Church's law or the Divine law really is regarding questions relating to marriage and divorce, and therefore Parliament, though desirous of supporting by temporal law in the main the principles of the Christian religion where Christians are in general accord, may, and does, in some cases find itself unable in the circumstances to give its coercive support to all prohibitions of the Christian Church, whether viewed as an aggregate of many differing sects, or as being more or less authoritatively represented by one or more of such sects. Thus, with regard to the question of marriage and divorce, the law of the State in many cases fails to impose any penalty either civil or criminal for breach of what is probably the Church's law, or even, to put it higher, the law of God, leaving the observance or non-observance of that law to the conscience of each individual, rather than compel its observance by the compulsion of temporal law. To take a familiar instance, the marriage with a deceased wife's sister was formerly forbidden both by the law of the Church and by the law of the State, but Parliament has now withdrawn its interdict, but that does not impose on any person any duty or obligation to violate the Church's law, it merely exonerates him from any temporal penalty if he does so. So in the case of divorces granted by Parliament with power to

remarry. This in no wise compels any one to remarry during the lifetime of the divorced spouse, but it frees him or her from any temporal penalty or inconvenience or disability for so doing. Those who can only be restrained by temporal law, may avail themselves of the license to violate the Church's law, and the Church can only visit such offenders with spiritual censures and penalties. It, of course, has no power to annul marriages which the State has determined may be contracted without violation of temporal law; but from the ecclesiastical standpoint, so far as such offenders submit themselves to ecclesiastical jurisdiction, they may be refused the privilege accorded to members in good standing. And in aid of the due observance of the Church's law, for which a temporal sanction is lacking, there may at all events be a social sanction, which may prove more or less effective.

If it makes no difference to a person's social standing whether he or she is living in violation of the Church's law, such offences will multiply, but if it is made manifest to all that such offences constitute a recognized social blot, no matter how much the State may tolerate them, there is less likelihood that people who have any regard for their reputation will perpetrate them. In short, one of the best safeguards for the due observance of the Church's law is the existence of a sound and healthy public opinion which will not tolerate its violation. For it is to be remembered, that although all its precepts are not enforceable by temporal law, yet Christianity is part of the law of England, as Blackstone long ago laid down, and it is also part of the law of Ontario, as Harrison, C.J., affirmed in *Pringle* v. *Napanee*, 43 U.C.Q.B. 285; and the like may be said as regards all the other Provinces of the Dominion.

HUMANITY AND THE LAW.

The subject of negligence is so prominent in these days of rapid transit and reckless disregard of life, that any intelligent discussion of the subject is always welcome.

Our esteemed contemporary, the *Central Law Journal,* publishes an excellent article under the above title, which will be read with much interest. It is written by Mr. Bruce, of Grand Forks, N.D., who has just been appointed a justice of the Supreme Court of that State. He writes as follows:—

Is human kindliness a duty in the eyes of the law? Are we our brothers' keepers? Are the ethics of Christianity a part of the law of the land? Does social progress require the legal sanction and protection of the altruistic and of the humane? To what extent should the public policy of the courts (for it is a judicial conception of a public policy which is behind almost all tort liability), recognize and keep abreast of our higher impulses and conceptions and express in the mandates of the law the concepts of a Christian civilization?

These questions have recently been presented in the three cases of *Union Pacific Railway Co.* v. *Cappier,* 66 Kan. 649, 69 L.R.A. 513; *Depue* v. *Flateau, et al.,* 111 N.W. 1, (Minn.); and *Cincinnati and N.O. and T.P. R. Co.* v. *Marr's Administratrix,* 70 L.R.A. 291 (Ky.); and should be squarely met and settled. The first of the cases arose in the State of Kansas. A trespasser on a railway right of way was struck by a moving car, without fault on the part of the railroad company, and was left by the side of the track in a mutiliated and bleeding condition, without any attempt being made to bind up his wounds or to check the flow of blood. Death ensued as the joint result of the injury and of the exposure. In reversing a judgment for the mother of the deceased, the court, among other things, said:

"These facts bring us to a consideration of the legal duty of these employees toward the injured man after his condition became known. Counsel for the defendant quote the language found in Beach on Contributory Negligence, as follows: 'Under

certain circumstances, the railroad may owe a duty to a trespasser after the injury. When a trespasser has been run down, it is the plain duty of the railway company to render whatever service is possible to mitigate the severity of the injury. The train that has occasioned the harm must be stopped, and the injured person looked after, and, when it seems necessary, removed to a place of safety, and carefully nursed, until other relief can be brought to the disabled person.' The principal authority cited in support of this doctrine is *Northern C. R. Co.* v. *State*. . . . The case does not support what is so broadly stated in Beach on Contributory Negligence. It is cited by Judge Cooley, in his work on Torts, in a note to a chapter devoted to the Negligence of Bailees, indicating that the learned author understood the reasoning of the decision to apply where the duty began after the railway employees had taken charge of the injured person. After the trespasser on the track of a railway company has been injured in collision with a train, and the servants of the company have assumed to take charge of him, the duty arises to exercise such care in his treatment as the circumstances will allow. We are unable, however, to approve the doctrine that when the acts of a trespasser himself result in his injury, where his own negligent conduct is alone the cause, those in charge of the instrument which inflicted the hurt, being innocent of wrongdoing, are nevertheless blamable in law, if they neglect to administer to the sufferings of him whose wounds we might say were self-imposed. With the humane side of the question courts are not concerned. It is the omission or negligent discharge of legal duties only which come within the sphere of judicial cognizance. For withholding relief from the suffering, for failure to respond to the calls of worthy charity, or for faltering in the bestowment of brotherly love on the unfortunate, penalties are found not in the laws of men, but in that higher law, the violation of which is condemned by the voice of conscience, whose sentence of punishment for the recreant act is swift and sure. In the law of contracts it is now well understood that a promise founded

on a moral obligation will not be enforced by the courts. Bishop states that some of the older authorities recognize moral obligation as valid, and says: 'Such a doctrine carried to its legitimate results would release the tribunals from the duty to administer the law of the land, and put in the place of law the varying ideas of morals which the changing incumbents of the Bench might from time to time entertain.' . . . The moral law would obligate an attempt to rescue a person in a perilous position, as a drowning child—but the law of the land does not require it, no matter how little personal risk it might involve, provided that the person who declines to act is not responsible for the peril."

The second case, that of *Depue* v. *Flateau et al.*, was tried in Minnesota. The plaintiff was a cattle buyer. He called at the farm of the defendants at about five o'clock in the evening of a very cold January day to inspect some cattle he understood they had for sale. It was dark when he arrived and he was unable to inspect the animals and he therefore requested permission to remain overnight. This request was refused, but the defendant Flateau, Sr., invited him to remain for supper. Soon thereafter he was taken violently ill and fell to the floor. From this point his memory was not clear as to what occurred, but he recalled that he again requested permission to remain at the defendants' home over night and that his request was refused. Defendants then assisted him from the house and into his cutter and started him on his journey home, seven miles away. He was found next morning, about three-quarters of a mile from defendants' house nearly frozen to death, having been again attacked by his ailment and having fallen from his cutter. He subsequently brought an action against defendants for damages, claiming that, "in view of his physical condition, which was known to defendants, they were guilty of negligence in sending him out unattended on a cold night to make his way to his home as best he could." This theory the court sustained. It held that "since the plaintiff was not a trespasser upon the premises of defendants, but was there by express invitation, the defendants

owed him the duty, upon discovering his physical condition, to exercise reasonable care in their own conduct not to expose him to danger by sending him out from their home, and that, if defendants knew and appreciated his physical condition, their conduct amounted to negligence, and the question of their liability should have been submitted to the jury."

In the case of *Cincinnati, N. O. and T. P. R. Co.* v. *Marr's Administratrix*, to which the Minnesota court referred, William H. Marrs, while in an intoxicated condition, wandered into the private switching yards of the Cincinnati, New Orleans and Texas Pacific Railway Company at Lexington, Ky., and at 11 o'clock in the evening, was found by the yardmaster asleep in the labyrinth of tracks. A switching crew coming along with an engine at the time, he was aroused by the crew and the yardmaster and told to move along. This he did, cursing his disturbers as he walked into the darkness. The crew then went to their supper (a midnight lunch), and, returning in an hour, started with their engine along one of the tracks for the purpose of getting a car of stock. While proceeding at the rate of six or seven miles an hour, the engine ran over Marrs, who had again fallen asleep (this time on the track), and inflicted injuries from which he died. To recover damages, for the death thus occasioned, an action was successfully prosecuted by the administratrix of the estate of the deceased man, and the judgment which was recovered was affirmed by the Supreme Court of the State of Kentucky, to which an appeal was taken. "We fully concede," the court said, "that Marrs' being drunk did not make him any the less a trespasser when he first went into the yard of the corporation, and his intoxication added no new duty from it to him then. But when its servants actually discovered him, trespasser though he was, they owed him the duty to refrain from injuring him, and this duty was as comprehensive as the helplessness of his condition demanded to insure his safety from injury by them. The servants of the corporation, after finding him in the yard, could not shut their eyes and

close their faculties to what must have been apparent to the most casual observer, and say that, under the circumstances surrounding Marrs, they owed him no duty, and could after that treat him as a trespasser. They knew he was intoxicated and in the yard, and, having seen him twice before within an hour in a drunken stupor, they had no right to assume that when left to himself he would not again sink into a torpor, as he had done twice before. . . . This being true they owed him one of two alternative duties—either to see him safely out of the yard, which common humanity required, or, failing in this, watch out for him as the engine moved about in the corporation's business."

In this last case there was no invitation and the injured man was a trespasser. It is to be noticed, however, that the employees of the railway company awakened and perhaps to that extent took him under their care. It is also to be noticed that the decision turns rather upon the alleged subsequent negligence of operating the engine in the yard when the switching crew knew or should have known that Marrs was wandering around therein, than on the failure to see him safely out of his dangerous position when he was first discovered and awakened. The analogy, therefore, which the court in the Flateau case, to which we have just referred, saw between this case and the one under its immediate consideration, is not perhaps as clear to others as it was to the Minnesota tribunal. In the Marrs case, there was a sin of commission as well as one of omission. In the Flateau case there was a sin of omission alone. In the Marrs case the employees of the railroad company, so the court held, negligently ran over the man rather than negligently failed to see him in safety from the yards. In the Flateau case the defendant did no affirmative physical act of which complaint could be made or on which an action of tort could be based. He merely denied the permission to stay with him overnight. There was no force and no violence. There was a verbal refusal of a verbal request and that was all. The Flateau case, indeed, is perhaps the first case to be found in the books in which the law of human-

ity and not of strict legal personal and property right prevails, and where a liability in damages is imposed for what was primarily a sin of omission rather than a sin of commission. The defendant, indeed, was held liable not because he did those things which he "ought not to have done," but because he "left undone those things which he ought to have done."

But neither the Flateau case nor the Marrs case can be reconciled with the strict rules of the past, which merely imposed a legal obligation for a negligent affirmative injury to personal or property rights. In both cases humanity was the impelling argument. In the Marrs case it is plain that the negligence in operating the train—the sin of omission—was merely an excuse for the judgment. The accident, indeed, happened an hour at least after the man had first been awakened. The engine crew had gone to supper in the interim. They could hardly have been expected to know that he was still in the yards. The judgment was really rendered because of the omission to lead the drunken man, when first awakened, from the labyrinth of tracks and to a place of safety. Nor can we believe that it was based upon the theory that the employees of the company, having once awakened the man, had assumed a responsibility to him and were bound to finish this work which they had begun and to incur a liability which they would not have incurred if they had let him alone. The fact was that, though a trespasser, he was in a position of danger from which, without danger or a serious loss to themselves, they could have extricated him, and the court, precedent or no precedent, was determined to hold them liable. The positive act, we believe, furnished an excuse for rather than the reason and purpose of the decision.

The subtle distinctions which are drawn in all these cases, indeed, must sooner or later be swept aside, and this both because the public as a whole has no respect for or interest in "nice questions," and because there is no merit or reason in them. The attempt which was made in the opinions in the Cappier case to draw a distinction between those cases in which the defendant has entered upon the care of the injured per-

son and negligently performed his work or desisted therefrom, and those in which he has refrained from aiding altogether, and to hold to a rule of liability in the former and not in the latter, is too opposed to a sound policy to merit any approval whatever. The result of the distinction would be to suppress all the instincts of humanity. It would prevent men, no matter how serious the catastrophe or great the necessity for help, from volunteering any assistance at all for fear that having once begun they could not afterwards desist. It renders one liable for negligence committed while acting humanely. It subjects one to no liability whatever if he allows the cowardly and selfish side of his nature to dominate him and refrain from helping altogether. In an age of legal refinement and of a superimposed law, such distinctions may perhaps be made and may live. They are out of place and impossible in an age of democracy in which the judge and the law-maker are every day finding it more and more necessary to keep in touch with, and to respond to, the ethical and social demands of an idealistic, aggressive and thinking constituency. So, too, the same sentiments which in the ages of the past led men to forcibly deal with the heartless recreant and the coward, will never in this day, where force and personal persuasion must give way to the law, allow that law to sanction heartlessness, and to absolve a man from the duty of rendering at least the first aids to those whom he has injured, even though he may not be legally liable for the injury itself.

One thing is certain, and that is, that the law of negligence and of tort liability has been, and always will be, progressive. It has in the past, it is true, been, and perhaps always will be largely judge-made. It has in the past hardly been popular in its origin. It has, however, though king and judge-made, largely reflected the social conscience of the king and of the judge. Though circumscribed by formalism it has had its origin and expansion in a policy of democracy and of humanity. As our democracy and humanity grow, that expansion will continue.

It is interesting, indeed, and profitable, to trace the gradual growth of the law of negligence in this respect and of the public policy which lies beneath it. The English law at first gave no general redress for negligence. That negligence was only actionable which was expressed in a direct and forcible tort and whose results were direct and proximate. There was no redress for the indirect results, even of forcible torts, nor was there any redress for the sins of omission. It was not until the reign of Edward III. that the action of trespass on the case was invented or created and that the law of actionable negligence really began to exist. With the invention of that writ a new right was created, the right to a relief in damages for injuries sustained through the failure of another, on whom the duty of care and protection was imposed, to perform that duty whether the negligence consisted in omission or commission. But there were questions even then to be settled and which are still largely unsolved. These questions are: "On whom is the duty of care and protection imposed," and "What are our real duties?" "Are we to any, and if so, to what extent, our brothers' keepers?" These questions must be fairly and squarely met. Do we, or do we not, owe to our fellowmen the duty of help and of protection in periods of dire distress when that assistance is easily within our power? Is there aught of Christianity in the law of the land?

Closely connected with the cases we have considered are those in which railway companies and manufacturers have been sought to be held liable for the value of the services of surgeons and of others which have been furnished persons whom they have injured, and it should be incumbent on the companies to procure such services. These cases on the whole point strongly to a new gospel of humanity. Their tendency is to make one believe that the law of negligence and the test of tort liability is to-day, as it always has been, progressive and is the expression of a growing judicial conscience, a conscience, it is true, which is limited by considerations of practicality and which is too regardful of precedents, but which is a conscience nevertheless.

"An implied power," says Judge Thompson in his Commen-

taries on the Law of Corporations, "will be ascribed to any corporation employing labour to incur expenses on account of injuries received by its employees in the line of their employment in the absence of any express statutory grant of such power. This implication rests upon the most obvious grounds of justice and humanity." "The principles of justice and the dictates of humanity, in our judgment, as well as the law," says the Texas Court of Appeals, "in a case where contributory, if not proximate and controlling negligence could be attributed to the injured man," "imposed upon the company the duty to furnish the wounded man medical aid; and the foreman acting for it, in the absence of any higher authority, had the implied power to bind the company for the payment of the services of the physicians whom he had employed." Where, indeed, employees are injured the courts seem generally willing to clothe even subordinate officers and agents with the authority to summon and contract for medical aid, where that aid is immediately necessary. The opinions which so far have refused to extend the doctrine of liability and of implied authority from the railroad cases in which, on account of the well-known dangers of the occupation, it was first asserted, to those connected with other industries, and the few railway cases which themselves deny the liability and the power, can generally be distinguished by the fact that in them liability is sought to be imposed for continuous as well as for immediate and temporary treatment. "In the first case," says the Supreme Court of Kentucky, "the services sued for were not confined to the immediate emergency, but lasted during several months. Appellee in the meantime resided in the same city and only a short distance from where appellant lived, and it would have been very easy for him to have inquired as to the alleged authority of their foreman to act for them. . . . In this case no necessity is shewn why appellee should have selected a physician to treat the injured man during his long confinement, as it does not appear that he lacked friends or relatives, who were both able and willing to do so for him."

There is, of course, much reason and justice behind this protest against liability for services rendered during an extended period of time. Except in the case of employees, and on a theory of employers' liability and risk of the business, there can, indeed, be no reason why the railway company or manufacturer or other defendant should, when the accident was not in the first place due to his negligence, pay for any medical or other services at all, except such other services as may be immediately necessary to save life or to prevent immediate suffering. The officer who calls the physician is as much the agent by necessity of the injured and unconscious man as he is of the railroad or other company. "Ordinarily," the courts say, "one running and calling a physician does not make himself liable, because a contrary rule would make a bystander hesitate to perform such an act of humanity." We would even go so far as to say that in such cases the physician should be compelled to at least temporarily minister and to run the risk of his patient's ability to compensate him for his services.

There is, except on the theory of a judge-made employer's liability law, or of an implied risk of the business in the case of those businesses and employments which, like railroading, are both quasi public and intrinsically dangerous, no more reason why the company should pay gratuities than that the physician or surgeon should furnish them. The doctor, like the railroad company, is a licensee. His business is affected with a public interest. The lawyer can, under the pain of disbarment, be compelled to gratuitously defend the pauper criminal. Why, in extreme cases, should not the nearby physician be placed under the same obligations?

All other services, however, which are immediately necessary, the injuring party should furnish, no matter how free from blame he may be, and especially should this be the case with employers and quasi public corporations, and theoretically at least, with all corporations. There can, indeed, be but little question that the duty to furnish employees with reasonably safe appliances and tools and premises on which and with which to work, and to

give warning of hidden and unexpected dangers, which was itself judge-made, will sooner or later be extended to that of furnishing the immediate relief which the emergency requires. It is, in short, a species of employers' liability insurance which the morals of the age will not suffer to be withheld. The public will, of course, pay the bill in the increased price of the articles they buy and of transportation, but they will no less insist upon the rule. It is not strictly logical, to be sure, nor it is consistent with the theory of a complete contractual equality between employer and employee to which the American courts have for so long adhered, and in which as a people we like to believe, but it is humane, and the courts are coming more and more to believe that in the matter of personal employment a contractual equality does not in truth exist.

Nor should the rule be necessarily applied to railway companies alone. It should equally be applied to all corporations which use appliances, vehicles, or machinery which are dangerous to human life, and especially to those which for purposes of gain, invite the public upon their premises. It should be applied to private persons who do likewise. The infliction of injury upon another, should bring with it the duty of at least temporary care, whether the entity who inflicts that injury be corporate or personal. If corporate, there is, of course, an added argument for the rule in authority, if not in logic, and the cases are now quite numerous which, irrespective of charter restrictions or authority, justify a greater police control of corporations than of natural persons. The theory, indeed, which underlies these cases, and which is that without the action of the state the corporation could not have been, or have had any rights at all, and that service to society is an implied condition of every charter, is one which the voting public will readily sanction, and it is the steadily voting public who ultimately control our public and social policies.

The expansion of the law in this respect would be no greater than the expansion of our statute law which has compelled railway companies to fence and to elevate their tracks, or which has

compelled them to use spark consumers, and has made the mere spreading of the fire from a railway track primâ facie evidence of negligence. These are all as it were, risks attendant to the license and the liability is based on the theory that not merely should a public utility serve the public, but that losses naturally resulting from the use of a privilege should be borne by the licensee. The railroad company is compelled to fence and guard its turntables against child trespassers, because, on account of the inquisitiveness of childhood, there is no other way to avoid the loss of life. Similarly, no matter how much we may preach and how much we may warn, accidents will happen, and the most careful at times will be careless. Crossing accidents will occur. Does not a due regard for human life demand that the bleeding or wounded man be temporarily ministered to by the agency which clearly occasions the loss? The law for the protection of human life and of the careless as well as of the careful, can demand the elevation of railroad tracks and the incidental expenditure of millions of dollars, and this simply because the railroad is inherently dangerous, and otherwise accidents must occur? Can not the law say that the railroad company, where the track is not elevated, shall at least temporarily care for those that are injured? Can not the law say that in cases of accident, such as a sudden sickness upon the highway, or upon a railway train, the nearby physician shall minister even though he may not be absolutely sure of his reward?

Nor should trespassers even be denied some measure of aid and of protection, although it is true that so far the courts have shewn but little sympathy towards such persons and have been slow to conceive of any duty of medical help. Except in the cases of young children, where the trespass is through ignorance and a natural curiosity rather than wantonness, and is often the result of a temptation too great to be borne, there can, indeed, be no reason why the railway company or the manufacturer or the business man should be compelled to bear the loss, any more than the physician himself, or why the former should be compelled to pay, any more than the latter to serve. There is much reason,

indeed, for holding that the medical profession is a business which is as much affected with a public interest as is that of the carrier himself. We are also aware that in the case of *Wills* v. *I. & G. N. R.R. Co.*, 41 Tex. Civ. App. 58, 92 S.W. 273, the court, in denying the implied authority of the conductor to employ surgical help, said: " We do not undertake to say what would be the power and duty of a conductor of a railway company where a passenger or employee was injured. Here the party injured was a trespasser and a similar distinction is to be found in a long line of cases." But the distinction and the rule should never, and we believe will never, be allowed to permit of absolute brutality, and the leaving of an injured man to bleed or to freeze to death by the roadside or by the railway track. The first aids to the injured must at least be administered, the person, if possible, must be carried to a place of safety and medical help must be summoned and the public authorities notified. There are points, indeed, beyond which sympathy and humanity submerge all rules of technical rights or technical logic.

It is interesting to note to what an extent the calls of a higher duty and humanity were recognized in the mandates of the Hebrew law and how far behind the ancient Hebrew we moderns often are. It is interesting and suggestive, however, to note that no penalty for, or right of civil action based upon the neglect of these mandates seems to have been provided. Perhaps it would be more in accordance with the fact, to say that these mandates, though contained in the so-called Laws of Moses, were not strictly laws at all, but were mere teachings (torah) or moral precepts. The Hebrew codes seem to have been in this respect loftier in their concept than that of Hammurabi or the laws of the Assyrians, Babylonians or Egyptians from which so much of them was derived, but to have recognized the same difficulty when an attempt was suggested of enforcing the mandates of humanity by the imposition of pains and of penalties. But perhaps no penalties were necessary in a small community and among a small people, such as the Israelites always were, where church and state were so closely co-ordinated and where the dis-

approval of the priestly class was so dreaded and was fraught with so serious a social consequence. Perhaps even to-day the disapprobation of our friends and of our neighbours may be made more potent for punishment than any pain or penalty or suit for damage that the law may sanction. Even now it is often the disgrace which comes from a conviction in the courts of law which men dread rather than the fine or imprisonment or monetary loss which results therefrom. The cases, indeed, are not uncommon where the men have been compelled to leave the communities in which they have lived, because at times of accident by drowning or fire they have hesitated in risking their own lives in order to save those of others. The brand of cowardice is even to-day of far-reaching injury to its wearer. The doctrine, indeed, that "one's first duty is to himself and to his family" and that "self-preservation is the first law," has never met with an unqualified support among a people such as ours whose very civilization is grounded on heroic self-sacrifice.

These Hebrew codes, it is true, say but little about the first aid to the injured as we now use the term. They say much, however, about the duty to the suffering and to the stranger within the gates. The duty of personal aid in the hour of distress, the manly and hospitable nomad and frontiersman takes for granted, and it is only the class selfishness of a crowded civilization which causes it to be forgotten. The care, indeed, which the Hebrew law enjoined concerning the property of the helpless, must have premised a regard for his life also. "If thou meet thine enemy's ox or ass going astray, thou shalt surely bring it back to him again," the code of torah says. "If thou see the ass of him who hateth thee lying prostrate under its burden, thou shalt in no case leave it in its plight; rather thou shalt, together with him, help it up." "Thou shalt not see thy fellow Israelite's ox or his sheep going astray and withhold thy help from them; thou shalt surely bring them again to thy brother. And if thy fellow Israelite do not live near thee, or if thou do not know him, then thou shalt bring it home to thine house, and it shall be with thee until thy fellow Israelite seek after it; then thou shalt restore it to him again.

Thus shalt thou do with his ass, and with his garment, and with every lost thing which belongeth to thy fellow Israelite, which he hath lost and thou hast found; thou mayst not withhold thy help."

Yet the ancient Hebrews were a primitive and a semi-barbarous people. Can the possessors of the newer dispensation afford to quibble and to debate?

APPLICATION OF THE COVENANT TO REPAIR TO DECAYED AND DEFECTIVE STRUCTURES.

Among the questions on which a legal practitioner has to advise almost daily is that of the scope of the obligation to repair, as expressed in the ordinary covenants to that effect contained in a lease or agreement; and, as the judgments of the Court of Appeal in the recent case of *Lurcott* v. *Wakeley* (104 L.T. Rep. 290; (1911), 1 K.B. 905), appear to mark something like a new departure in the law applicable to the subject, a few observations suggested by those judgments are here offered in view of the general importance of the matter.

That the amount and quality of repairs necessary to satisfy the covenant are dependent upon the age, class, and condition of the premises demised has been established by a long series of decisions extending over many years. In the earlier cases, indeed, it appears to have been thought that, as the result of this, no greater obligation was thrown upon the tenant than that of keeping the premises generally in about the same condition of repair as that in which they were when they were demised to him. This, however, was finally decided, in the year 1847, to be an unsound view of the law in the case of *Payne* v. *Haine,* 16 M. & W. 541, where a new trial was ordered on the express ground that the judge had directed the jury to act on that basis; and ever since that decision it has been regarded as settled that under a mere covenant to keep premises in repair the lessee may have to put them, if necessary, into a better con-

dition (and so keep them) than that in which he received them from the landlord.

There are, however, many traces of the doctrine that the covenant did not extend so far as to impose upon the tenant the duty of giving to the landlord the benefit of "new work generally," or that of replacing an old structure by a new one when the former had become worn out by mere process of time, or rendered useless for its purpose, after the lapse of an interval more or less long, owing to its inherent defects of construction. The classic reference on this topic is, of course, to the passage in which Chief Justice Tindal summed up the law to a jury at Nisi Prius in the case of *Gutteridge* v. *Munyard* (1834), 1 Moo. & R. 334; 7 Car. & P. 129,—a passage which, after being cited with approval again and again in the courts, and accepted by text-writers during several generations, has now been authoritatively pronounced to be at least misleading, if not incorrect.

The passage in question is to the effect that, where an old building is demised, it is not meant by a mere covenant to repair that it is "to be restored in a renewed form at the end of the term, or of greater value than it was at the commencement;" and that "what the natural operation of time flowing on effects, and all that the elements bring about in diminishing the value, constitute a loss which, so far as it results from time and nature, falls upon the landlord." Singularly enough, two reports of the summing-up have been preserved, and it is only in one of them, 1 Moo. & R. that the passage occurs textually, which has lately provoked so much comment, though no doubt the other is not very materially different; but, as has already been said, the statement of law which it embodies appears, in the long period which has elapsed since it was laid down, not only to have remained unchallenged, but to have been adopted as the basis of numerous judgments of high authority. It may suffice to refer for this purpose to *Lister* v. *Lane*, 69 L. T. Rep. 176; (1893), 2 Q.B. 212, where Lord Esher, M.R., in delivering the leading judgment of the Court of Appeal, transcribes and accepts it without qualification.

Now, however, it is definitely laid down that, if not altogether wrong, it is only in a very restricted sense that the ruling of the Chief Justice can be regarded as accurate. That the words are capable of being read too widely, and that they should receive some limitation, has, perhaps, long been obvious; for to say that a tenant may not be bound by the covenant to restore the premises in an improved condition, or in a way which may improve their value, and that he is not responsible for any effects caused by time or the elements, is to run counter to doctrines already spoken of as well-established. The curious point is that no such limitation seems to have been yet suggested.

But to lay down what the precise limitation should be is the real difficulty. At the root of the whole matter, perhaps, lies the principle that the covenant in question is one only to repair, and not (as it has been put) "to give a different thing" from that which the tenant took when he entered into it: (see *Lister* v. *Lane,* sup., per Lord Esher, M.R.). But it is now established by the latest decision of the Court of Appeal that "a different thing" in this connection means a different principal subject-matter of demise, and that it does not follow that he is called upon to give "a different thing" because he may have to replace or renew a structure only in its subordinate parts. To determine, however, what are its "subordinate parts" within the rule will, it is conceived, often be a matter giving rise to much trouble, and the whole question is, no doubt, to a great extent one of fact and of degree. Suppose, for instance, the demise includes fifty separate houses, would the decay from inherent defects of one of them entail liability for its reconstruction as relating only to a subordinate part of the whole subject-matter of the demise?

Before *Lurcott's* case there were three reported decisions—two of them also decisions of the Court of Appeal—on the subject of the effect of the covenant to repair on structures which have "lived their life," either through mere lapse of time, or from their inherent faultiness of construction, or both;

and all of them are based on the view that on the facts as proved the result was not within the scope of the covenant.

The first, decided in 1893, was *Lister* v. *Lane,* to which reference has already been made. In this case an old house had been built on a timber structure laid upon river mud several feet above a layer of solid gravel, and the only way of effectually dealing with it was by the process known as "underpinning," which consists of digging down to the gravel and then building up from that to the brickwork; and it was held by the Court of Appeal that work of this kind was not within the covenant to repair, because it would be in effect "making an entirely new and different house." Having regard to what has already been said, it seems important to notice that the house in question (which was condemned as a dangerous structure and consequently pulled down) was clearly not the principal, but apparently only a very subordinate, part of the subject-matter of the whole demise which was comprised in the covenant to repair. It would therefore appear that for an erection to be a subordinate part of a demise within the rule in *Lurcott's* case it must be a subordinate part (such as a roof, a floor, or a wall) of some structure, and that separate buildings and areas comprised in a single demise should be looked upon for this purpose as separate and distinct.

The second decision, also one of the Court of Appeal, was that of *Wright* v. *Lawson* (19 Times L. Rep. 203, 510), ten years later. In this case a local authority had served notice to secure the brickwork of a certain bay window of a house, but it was not possible to re-erect the window as it existed before on account of certain defects in its construction, whilst a new bay window could only be built by erecting supports of a substantial character. It was held that the tenant could not under the covenant to repair be rendered liable to replace the old window, and that he had sufficiently discharged his obligation by building a new one set back in the main wall of the house.

The third and last case was that of *Torrens* v. *Walker,* 95 L. T. Rep. 409; (1906), 2 Ch. 166, before Mr. Justice Warrington.

In this case the obligation to repair which came in question was one undertaken by the landlord, who had agreed to keep the outside of the demised premises at all times in good repair; but the learned judge held that the obligation was subject to exactly the same limitations as in the case where it rested on the tenant. Whether this view was correct seems open to question; but with that we are not concerned here. Assuming that it was, there appears every reason for refusing to attach liability to the lessor, in respect of his covenant. Substantially the whole of the structure which was the subject-matter of the covenant to repair had to be pulled down, and it could not have been re-erected in the same manner as before. Applying the test laid down in *Lurcott's* case, no one, if the building had been re-erected, would have called it the same building as it had been. The most important difference between this and the two earlier cases—apart from the question, to which we have just adverted, as to the incidence of liability under the covenant being on the landlord—seems to be that no direct evidence was forthcoming as to any faultiness of construction, and such faultiness was apparently inferred from the circumstance that the building, though it had had a long life (about 200 years), might, like other buildings, have lasted longer still.

In *Lurcott's* case the facts were few and simple. It may be premised that the covenant there was one couched in the most stringent terms, for under it the tenant had undertaken to repair and "keep in thorough repair and good condition" all the premises demised to him; but, though Lord Justice Fletcher Moulton seems inclined to rest his judgment mainly upon this consideration, the other members of the court treat the matter just as if the covenant had been expressed in the ordinary general terms. Shortly before the expiration of the term a dangerous structure notice had been served requiring an external wall to be taken down to the level of the ground floor. The lessee failed to comply with this notice, and the lessor did the work a few weeks after the term had ended, and afterwards, in compliance with a further notice then given under sec. 208 of the

London Building Act, demolished the part of the wall which was below the ground, and rebuilt it with concrete foundations and damp-courses in accordance with the requirements of the Act. It was held that the tenant was liable under his covenant for the whole of the cost of the work which had been executed by the landlord.

The gist of the decision appears to be in the finding of fact that with a new wall the house would still be the same house, and therefore that the repair or restoration found to be necessary was only restoration of a "subordinate" part of the subject-matter of the covenant. It is not, however, easy to see the real distinction in this respect between the case and *Wright* v. *Lawson*. Surely the window in that case was also only a subordinate part of the subject-matter of the covenant. Supposing the new window had been erected with the necessary substantial supports required by the local authority, would anybody have said that the house was a different house to the one which existed before? In the one case the thing replaced was a window, and in the other a wall; the window required new supports, just as the wall required new foundations. It is quite true that the external form and appearance of the new window, if erected, unlike that of the new wall, would have been different. But beyond the fact that the change was more obvious to the eye in the one case than in the other, can any other real difference be suggested? Lord Justice Buckley, who was apparently the only judge who dealt with *Wright* v. *Lawson*, said that the bay window there could not be replaced, but could only be reproduced by that which would be a new structure. But if a window be a "structure" within the rule, why is an external wall not a structure also? If repair (as the learned judge says) is restoration by renewal or replacement of subsidiary parts of a whole, while renewal, as distinguished from it, is reconstruction of substantially the entirety of the subject-matter of the covenant, why, if the wall (as it clearly is) is only a subsidiary part of "the whole," is replacement of the window a reconstruction of the entirety? The entirety of what?

The truth seems to be that in order to reconcile the two decisions a further limitation ought to be introduced into the rule as enunciated in the later case, and the matter would then stand thus: primâ facie the burden of repairing, restoring, and renewing is on the tenant who has entered into a covenant to repair. But he can relieve himself of that burden if he can shew that, owing to circumstances beyond his control, the work necessary would be a work wholly of reconstruction, provided he can establish, either that that work would go to what is substantially the whole subject-matter of the covenant, or (if it involve only a subordinate part of the demise) that that subordinate part would, after its reconstruction, necessarily present a different form to the form it had before. It will be noticed that in *Lurcott's* case the Master of the Rolls says that the question to be asked is whether it can fairly be said that the character of the subject-matter of the demise, or part of the demise, has been changed; and possibly he may have had the above considerations in view, though we are left without much guidance as to the nature of the "part of the demise" to which the rule applies.

It may be further observed that the ground on which the principle rests which absolves the tenant from liability when there has been a radical change of circumstances in the character of the whole subject-matter of the demise is said, in the same judgment, to be that such a change of circumstances could not have been within the contemplation of the parties when they entered into the covenant. It is, however, well settled that if demised premises are destroyed by fire, the tenant, unless specially protected by the terms of his lease, is bound, under his covenant to repair, to rebuild them. Why such an event should be considered more within the contemplation of the parties than the decay of the premises from the lapse of time, or from some structural defect, it is not, perhaps, easy to understand. One would have thought that in the usual course of things it would be, not more, but less within such contemplation.

The foregoing observations appear to suggest that the matter is one replete with difficulties, and that the latest decision reported on the subject is not at all likely to be the last.—*Law Times.*

CONVICTION OF PALMISTS.

Several recent prosecutions of "professional palmists," and in particular, a case heard before the magistrate at the Marylebone Police Court on the 4th inst., illustrates what is the gist of the offence pretending to tell fortunes by palmistry. The defendant was charged with "pretending or professing to tell fortunes by palmistry with intent to deceive." It was urged on his behalf that there was no evidence of intention to deceive, but the learned magistrate held that it was immaterial to prove that intention, as palmistry imported a deception. He was probably following a dictum of Mr. Justice Denman in *Penny* v. *Hanson*, 56 L.T. Rep. 235; 18 Q.B. Div. 478. In that case the defendant was convicted of pretending to tell fortunes with intent to deceive by means of astrology, and there was no evidence to shew whether or not he believed in the truth of his profession. Mr. Justice Denman held that the mere fact of professing to tell fortunes by astrology was evidence of an intention to deceive, in that nowadays no sane man believes in such a power. That case left open the question whether the mere pretending or professing to tell fortunes was an offence, without averring intention to deceive. The Vagrancy Act, 1824, s. 4, which creates the offence, enacts that "Every person pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects . . . shall be deemed a rogue and vagabond. . . ." In *Reg.* v. *Entwistle* (80 L. T. Rep. 657; (1899) 1 Q.B. 846, the Divisional Court upheld a conviction for "unlawfully pretending to tell fortunes, contrary to the form of the statute." The defendant had professed to tell fortunes by means of palmistry, and, upon conviction, moved the court for a certiorari to quash the same on the ground that the alleged offence was not within the above section of the Vagrancy Act,

as the conviction did not aver an intention to deceive. The court refused to quash the conviction on the ground that, although to prove an offence under the Act it was necessary that the thing should be done in order to deceive, the words "pretending or professing" imported that intention, and that the words "to deceive and impose . . ." in the statute referred only to "using any subtle craft, means, or device, by palmistry or otherwise." Hence it would seem that the offence of telling fortunes by palmistry may be laid and described either as "pretending or professing to tell fortunes by palmistry," or as "using a subtle craft, means, or device by palmistry to deceive and impose, etc." The Divisional Court in the last cited case followed and adopted a dictum of Baron Cleasby in *Monck* v. *Hilton*, 36 L.T. Rep. 66; 2 Ex. Div. 268) to the effect that "The section includes all persons who pretend to tell fortunes (which imports that deception is practised by doing so), or use subtle devices, by palmistry or otherwise, to defraud."—*Law Times.*

The mass of cases reported in the United States is simply appalling in its volume, and in the extent of their increase from year to year. It is said that the volumes of reports extant in 1872 were 1517, and that the number up to a recent date was 5,947; easily 6,000 by this time. By multiplying the number of volumes by the number of cases contained in each, one has some idea of what one would have to wade through to learn all that has been said on the various subjects adjudicated upon.

The fusion of law and equity is still engaging the attention of the Bar in the United States. The Committee of the American Bar Association to prevent delay and unnecessary cost in litigation had an article on the subject prepared by Prof. Pound, which is published in some of our exchanges. It seems strange that that which engaged the attention of the profession in England and her dependencies so many years ago, and which was almost universally adopted by them, is still a moot question with our usually go-ahead neighbours.

REPORTS AND NOTES OF CASES.

Province of Ontario.

HIGH COURT OF JUSTICE.

Divisional Court, Chy.] [Oct. 6.

YOUNG *v.* TOWNSHIP OF BRUCE.

Highway—Non-repair—Injury to traveller—Notice of accident —Absence of details—Sufficiency, in view of knowledge of Council.

Appeal by the plaintiff from the judgment of the County Court of the county of Bruce, dismissing an action brought to recover damages for personal injuries sustained by the non-repair of a township highway, upon which plaintiff was being carried in a public vehicle on Dec. 8, 1908. The vehicle, with the plaintiff in it, went over an embankment, which should have been guarded by rails, but was not. The action was dismissed on the ground that the notice of the accident given by the plaintiff to the defendants was insufficient.

The defence pleaded that no notice of the accident was given as required by Municipal Act, 1903, s. 606, sub-s. 3. It appeared however, that the following letter was written by the solicitors to the town clerk, which it was claimed was a sufficient notice:—"We have been consulted by the plaintiff regarding the injury received by him on the 8th December, while being driven in the 'bus between Underwood and Port Elgin in consequence of the road being out of repair. No protection was provided, and the 'bus was thrown down some considerable distance. This notice is given pursuant to the Municipal Act." On Jan. 20th, the town clerk replied: "Yours of the 31st re alleged accident to Young received and considered by the council. I have been instructed to notify you that Bruce township council will not pay any damages, as they do not consider they are liable for any such damages."

Held, 1. That although the letter to the town clerk was defective in details it substantially set forth the fact of the accident and the cause of it; and it was sufficient if it gave the information which the law demands should be given.

2. Under the circumstances of the case, the vagueness in the notice in reference to the precise locality on the highway where the accident occurred was not material inasmuch as the Council from its knowledge of the culverts, hollows and places where protection was needed, was given sufficient information to make investigation in view of the threatened action; and the maxim id certum est was applicable to eke out the apparent insufficiency of the notice. *O'Connor* v. *City of Hamilton*, 10 O.L.R. 529, distinguished.

Washington, K.C., for plaintiff. *Kilmer*, K.C., for defendants.

Divisional Court, K.B.D.] WARD *v.* MCBRIDE. [Oct. 12.

Slander—Words imputing a felony—"Robbery"—Innuendo a legal impossibility—Explanation by other words—Right of defendant to shew facts.

Appeal by defendant from the judgment of MULOCK, C.J. Ex.D., upon the verdict of a jury, in favour of the plaintiff, in an action for slander. The defendant, who was an alderman of the city of Toronto, at a meeting of the City Council referred to an action brought by the city corporation against the present plaintiff, (*City of Toronto* v. *Ward*, 18 O.L.R. 214), and said that the plaintiff had "robbed the city." This was the slander charged. The defendant was at the time urging that as a reason why no consideration should be shewn to the plaintiff in a matter then before the council. He explained that what he meant by robbing the city, etc., was that the plaintiff had withheld money which had been recovered in the action. The plaintiff alleged that this was the charge of a crime.

Held, 1. The Common law does not permit any one to lay hold of a single word in a statement, and assert that as such word, in its strict legal sense, is the name of a crime, therefore a crime is imputed by the speaker using the word. The whole of the circumstances under which the word is used and the whole of the context must be considered. If it appear either from the utterances as set out in the claim or in the innuendo, or in the evidence given, that in truth and in fact there was no charge or imputation of crime, the jury should not find the defendant liable, though he had in words imputed a crime.

2. As the words alleged in the statement of claim were "Mr. Ward has robbed the city of $25 a year," and as it could not

be contended that what was charged was actual theft, the innuendo fails.

3. The occasion was privileged. Alderman are legislators in the same sense as members of Parliament. The defendant had the right as an alderman to say anything which he honestly believed to be true, though false in fact; but, if a crime was in fact imputed by him and he did not actually believe that the plaintiff did commit a crime, the qualified privilege would be nullified.

Appeal allowed with costs, and the action dismissed with costs.

R. McKay, K.C., for defendant. *M. K. Cowan*, for plaintiff.

Divisional Court, K.B.D.] [Oct. 16.

VERRALL *v.* DOMINION AUTOMOBILE CO.

Motor vehicles—Excessive speed—Motor taken out by servant for his own purposes without permission—Neglect by owner of precautions to prevent unauthorized use.

Appeal by defendants from the judgment of FALCONBRIDGE, C.J.K.B. in favour of the plaintiff, after trial without a jury, in an action for damages for injury to a taxicab owned by the plaintiff, owing to a collision with a motor-car of the defendants, taken out of the defendants' sale-rooms by a demonstrator employed by them, without their knowledge or permission, and for his own purposes.

Held, 1. The import of 6 Edw. VII. c. 46 and 9 Edw. VII. c. 81, is that though the owner of the motor may not be responsible in a penal aspect for the violation of the Act unless personally present, he is responsible in damages when there has been a violation of the Act by his vehicle. There is a quasi-liability in rem, which attaches to him as the owner of the law-breaking vehicle.

2. The defendants' motor being held for sale only, and not for hire or private use, there was an obligation on the owner to take care that it was not taken out by any servant for unauthorized purposes and there was negligence in not effectively providing against such unauthorized use.

BOYD, C. (in part): "The provisions of the special legislation indicate pretty plainly that the mind of the Legislature was to abrogate to some extent the common law rule that the master of a

vehicle is exempt from responsibility if his servant does an injury with the master's vehicle, when, outside of the duties of his master's employment, he is out at large on an errand or a frolic of his own. The Legislature has intended that this dangerous use of these licensed vehicles, when the statute has been violated, should be compensated for to those who suffer by the proprietor of the vehicle. As between him and the public who use the highways, he is the responsible party, and it behooves him to use all necessary safeguards to prevent this abuse. It is one of the requirements of the statute (s. 14) that every motor shall be provided with a lock, key, or other device to prevent it being set in motion; and, though that is primarily intended to secure it when left in the street or other public place, it suggests an easy way by which it may be secured at night in the owner's own premises from being mishandled and misused by his own employees."

Thurston, K.C., for plaintiff. *Curry*, K.C., for defendants.

Middleton, J.] [Oct. 17.

RE TOWN OF SARNIA AND SARNIA GAS AND ELECTRIC LIGHT CO.

Arbitration—Municipal Act—Disqualification of arbitrator—Removal of—Member of school board.

There was a summary motion by the company for an order declaring that A.W. was disqualified from acting as arbitrator for the Town of Sarnia upon an arbitration between the town and the company under the Municipal Act, he being one of the school trustees.

Held, 1. Although an award may be set aside for misconduct of the arbitrator and for bias this bias does not furnish ground for removal under the statute.

2. A.W., though a member of the school board, is not a member or officer of the corporation, and so cannot be disqualified under the Municipal Act and no bias could be alleged against him.

Frank McCarthy, for the applicants. *Featherston Aylesworth*, for the town corporation.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] PEASE v. RANDOLPH. [Oct. 23.

Bond—Successive actions on same bond—Pleading—Amendment—Presumption in favour of seal having been affixed with authority—Agreement to stifle prosecution—Illegal consideration.

Held, only one action can be brought upon a bond with a penalty; but, if the objection is not pleaded to a second action, it cannot be raised at the trial and an amendment raising it should not necessarily be allowed.

The defendants had signed the bond in question in this action, at the request of one Turner, who was indebted to the plaintiff. They intended the document to be their bond and it purported to be under seal, and it was sealed when handed by Turner to the plaintiff, but they swore that there were no seals upon it when they signed it. They did not, however, say that they did not authorize Turner to complete the document and make it what it was intended to be by affixing seals.

Held, that it should be presumed that the defendants had authorized Turner to affix the seals for them, and that their defence of alteration of the bond failed.

Turner had become indebted to the plaintiff under circumstances exposing him to a criminal prosecution, in respect of the debt, and, at the interview between him and the plaintiff's solicitor respecting a settlement, the latter told him that he was liable to a criminal prosecution; but, outside of this, there was no evidence of a promise or agreement not to prosecute.

To induce the defendants to give the bond in question, Turner told them he was threatened with arrest, but for a totally different offence.

Held, distinguishing *Jones* v. *Merionethshire, etc.*, [1891] 2 Ch. 587, [1892] 1 Ch. 173, that there was not sufficient evidence to warrant a finding that the bond had been given for an illegal consideration, viz., an agreement not to prosecute.

Semble, such a defence, if made out by the evidence, should be given effect to by the Court of Appeal, although not pressed at the trial, or mentioned in the præcipe filed for the appeal.

Scott v. *Brown*, [1892] 2 Q.B. 724, and *Gedge* v. *Royal Exchange*, [1900] 2 Q.B. 220, followed.

Cooper, K.C., and *Meighen*, for plaintiff. *H. A. Burbidge*, for defendants.

Full Court.] [Oct. 23.

RE WOOD AND CITY OF WINNIPEG.

Municipality—By-law—Unreasonableness and discrimination in residential districts—Prohibition—Removal of prohibition in favour of individual owner—Acquiescence.

Appeal from decision of PRENDERGAST, J., noted ante, p. 279, dismissed on the ground that the by-law objected to was within the powers of the city council and was not unreasonable or discrimatory and that the city had obtained a substantial and sufficient consideration from Millman for the removal of the restriction as to his property.

The court declined to express any opinion as to whether or not the applicant was estopped by his acquiescence and delay from making his application.

Phillipps and *Whitla*, for applicant. *T. A. Hunt*, for city of Winnipeg.

Full Court.] LEWIS FURNITURE CO. v. CAMPBELL. Oct. 23.

Undue influence—Father and son—Fraudulent misrepresentations.

The defendant was induced to sign the promissory note for $500 sued on as security for his father. He was only 22 years old and his account of what took place when he signed the note was that the plaintiffs' manager represented to him that a third party, who was liable for the debt along with the father, had offered to pay $200 or $250, and that with that and what they had in the warehouse there would not be very much for him to pay. The defendant's father was also present at the interview and importuned the son to come to his relief by signing the note, which he did very reluctantly and after refusing at first. The plaintiff's manager and his solicitor, who was also present, denied these statements at the trial in the court appealed from, but the judge entered a verdict for the defendant, thereby accepting his version of the facts. No evidence was given as to whether or not the third party referred to had actually made

any such offer, nor was anything said as to the amount or value of what was in the warehouse as being applicable in reduction of the debt.

Held, that the defendant was not liable on the note as there was undue influence brought to bear upon him and misrepresentation as to the amount of the liability he was incurring and a want of independent advice to one so young, all of which brought the case within the principles laid down in *Bank of Montreal* v. *Stuart*, [1911] A.C. 120.

Per CAMERON, J.A., dissenting:—The alleged representation as to the offer that had been made by the third party was not proved to have been false and therefore that ground failed. As to the statement that "there was furniture in the warehouse," this was not of itself so material to the transaction that the falsity of it would vitiate the note, and there was not sufficient in the facts relied on to warrant a finding that any "undue influence," within the meaning of that term as used in the decided cases, had been brought to bear upon the defendant as he was able to take care of himself and fully understood the nature of the transaction.

Donovan, for plaintiff. *Towers*, for defendant.

Prendergast, J.] PERKS v. SCOTT. [Oct. 16.

Vendors and purchasers—Cancellation of agreement by vendor for default of purchaser—Different modes of cancellation provided in agreement—Equitable relief against forfeiture.

The agreement of purchase by plaintiff from defendant of the land in question provided in one paragraph that, in case the purchaser should at any time be in default, the vendor should be at liberty at any time after such default, with or without notice to the purchaser, to cancel the contract and declare the same void and forfeit any payments that might have been made on account thereof and retain all improvements, etc., and that the vendor should be entitled, immediately upon any default as aforesaid, without giving any notice or making any demand, to consider and treat the purchaser as his tenant, holding over without permission or any color of right, and might take immediate possession of the premises and remove the purchaser therefrom. Further on in the agreement, and separated from

the above provision by other covenants, there were provisions for two other modes of cancellation in case of default, one by service of a notice personally on the purchaser of intention to exercise the power of cancellation after one month, to be followed at the end of the month by a notice similarly served declaring the cancellation to be complete and effective, and the other by notice, after the default had continued for three months, declaring the contract null and void, addressed to the purchaser deposited in the post office at . . . and directed to the post office at . . .

Held, that, upon plaintiff making default, the defendant had a right to select any one of the three modes of cancellation provided for, and that a notice pursuant to that first above quoted, personally served upon the defendant, was valid and effectual as a cancellation of the agreement, subject to the power of the court to give equitable relief if the circumstances should warrant it. *Canadian Fairbanks* v. *Johnston*, 18 M.R. at 601, referred to.

The defendant having, in his statement of defence, submitted to redemption by the plaintiff, upon payment of the arrears and certain expenses, judgment was given accordingly, allowing the plaintiff two months after the Master's report to pay the amount found due by him and costs, and in default that the agreement should be cancelled.

Cooper, K.C., and *Meighen*, for plaintiff. *Fullerton* and *F. G. Taylor*, for defendant.

Robson, J.] [Oct. 19.

DART *v.* ROGERS.

Vendor and purchaser—Specific performance—Misrepresentations by purchaser inducing sale—Materiality of.

Held, 1. A decree for specific performance of an agreement of sale will not be refused because of any misrepresentations by the purchaser, unless they are material, that is, relate to some part of the contract or its subject-matter, and a buyer is not liable to an action of deceit for misrepresenting the seller's chance of sale or the probability of his getting a better price for his property than the buyer offers. *Archer* v. *Stone*, 78 L.T. 34, and *Vernon* v. *Keyes*, 12 East 632, 4 Taunt. 488, followed.

2. Applying this principle, statements made by the plaintiff to the defendants, during negotiations for the purchase of the

property in question, that there was nothing in a rumor (said to be current) of a big concern having bought, or being about to buy a large parcel of land on the opposite side of the street, of part of which the plaintiff was one of the owners, with the intention of erecting extensive improvements thereon, that he, the plaintiff, had never been approached by any one with a view to purchasing his interest in such property and that part of that property could then be bought at a price per foot frontage very much lower than the defendants were asking for the property in question, even if false to the knowledge of the plaintiff, were held not to be material to the contract or such as to entitle the defendants to refuse to carry out their sale.

3. A misrepresentation as to who the real purchaser was, might, under some circumstances, be so material to the contract as to vitiate it, but in this case the defendants, although they had been told by the plaintiff that he was buying for another named person, could only say that, if they had known that the plaintiff was buying for himself, they would have been suspicious that he was concealing facts which would have made the property more valuable and would not have sold to him at the price actually fixed, and they actually made out and signed the contract of sale in the plaintiff's own name. It was therefore held that the alleged misrepresentation as to the identity of the proposed purchaser was not, under the circumstances, material to the contract.

Wilson, K.C., *Andrews,* K.C., and *H. A. Burbidge,* for plaintiff. *Sutton, Fullerton* and *O'Connor,* for respective defendants.

Province of British Columbia.

SUPREME COURT.

Morrison, J.] [Oct. 24.

IN RE MABEL PENERY FRENCH.

Statute—Construction—Legal Professions Act, s. 37, *sub-ss.* 3 (*b*), 4(*b*)—*Interpretation Act, R.S.B.C.* 1897, *c.* 1, *s.* 10, *sub-ss.* 13 *and* 14—*Right of women to admission to legal profession.*

On an application for a writ of mandamus to compel the Benchers of the Law Society to accept the application of Mabel

Penery French for enrolment as an applicant for call and admission,

Held, that the legislature, when framing the Legal Professions Act, had not in mind the probability of women seeking to enter the profession, and therefore any remedy for the omission lies with the legislature and not with the Benchers of the Law Society. Application refused.

See *In re Mabel Penery French,* 37 N.B. 359.

J. A. Russell, for application. *L. G. McPhillips,* K.C., contra.

Book Reviews.

The Law Quarterly Review, October. Edited by the Rt. Hon. Sir Frederick Pollock, Bart., D.C.L. London: Stevens & Sons, Limited, 119 and 120 Chancery Lane. 1911.

This number, which concludes volume 27, is an exceptionally interesting one. In addition to the many notes on current legal literature and recent decisions, it contains the following articles: The reception of Roman law in the 16th Century; Principles of liability for interference in trade, profession or calling, by an Indian writer; The Land Transfer Report; Lessee's covenants to repair; Death duties; Habeas corpus in the Empire, etc., with the usual book reviews.

Bench and Bar.

Judicial Appointments.

Hugh Thomas Kelly, of the City of Toronto, in the Province of Ontario, to be a Judge of the Supreme Court of Judicature for Ontario, a Justice of the High Court of Justice for Ontario, and a member of the Common Pleas Division of the said High Court of Justice, in the room of Hugh McMahon, deceased. (Nov. 13.)

Flotsam and Jetsam.

The (English) Law Society's new President, Mr. William John Humfrys, is a Hereford solicitor, who has been mayor more than once of his city, and is well known as an able and well-read lawyer, who has led a strenuous life at home and yet has found time to travel much abroad. Mr. Humfrys is a veteran, for he was admitted in 1863, sixteen years before his predecessor, and yet he ranks almost as a junior among his learned friends at Hereford, which has long been famous not only for the high professional standing and character of its solicitors, but also for their longevity. Thus, Mr. J. F. Symonds, Mr. Humfrys's father-in-law, died a few months ago at the age of ninety, having been called in 1841; Mr. H. C. Beddoe, the Bishop of Hereford's legal secretary, was admitted in 1847; Mr. John Lambe, the city coroner, a relative of Lord Llandaff, another veteran, who also comes from Hereford, was admitted in 1855; Lord James of Hereford, whose death last month the profession deeply regrets, was well over eighty, while his elder brother, who died a few years ago, Mr. Gwynne James, was called in 1845, and practised his profession down to the last, being held in not less esteem in Hereford than Lord James himself.—*Law Notes.*

We read in the papers recently that the Latin quarter students created a riot at the Sorbonne because the Latin paper in the Bachelorship examination was too difficult. The dissatisfied students, it seems, set up a deafening din in one of the halls of the school, the windows fairly rattling to their cries of "A bas Uri," the examiner who set the papers. The malcontents, after being expelled, formed a procession and paraded through the Latin quarter, shouting in a dismal monotone the passage from Cicero's "De Gloria ac Morte," which brought about their downfall in the examination. Two hundred students returned to the Sorbonne, and after being charged by the police in the courtyard made a bonfire of the examination papers. What a dull lot we are in this old country? Articled clerks here often consider the examination questions too hard, but all they do is to "cus and swear" privately. How much more exciting life would be if they would only copy the example of their French *confrères!* Chancery Lane would be quite lively.—*Law Notes.*

Canada Law Journal.

VOL. XLVII. TORONTO, DECEMBER 1. No. 23.

THE DOMINION LAW REPORTS.

A new departure in law reporting is announced under the above title by the Canada Law Book Company, Limited, of Toronto. In the circular just issued by them, the main idea appears to be to standardize law reporting in Canada and to bring the reported decision of every province of the Federal Courts into one series.

The expansion of interprovincial trade and of corporation business has brought the provinces more closely together as regards the interpretation of the law. Although the confederation of the Canadian provinces had a statutory beginning in 1867, the real confederation has been developed since, not only as to trade and national spirit, but as to the various forms of local government in the provinces, and the reliance placed by the Courts of one province upon the decisions of the Courts of another.

What is aimed at in this new series is to systematize the reporting of all cases involving important points of law in Canada, and to furnish the profession with headnotes stating the principles of law for which the reported case can be cited as authority, and to follow the unabridged text of the delivered opinion of the judges, with annotations to the principal cases, briefing the leading cases on the same point in the other provinces and in England.

A sample report of an Ontario decision indicates the method which is to be followed, and no further recommendation is required than the high standard of the head notes and annotations contained in the sample report, which has been printed for free circulation. The profession has long endured the historical headnote which, not infrequently covers two pages of closely

printed small type, and which very often fails to ennunciate any principle or doctrine of law in any other way than by inference from the circumstances which it details, and the general result which announces who has been the successful party.

A proper syllabus or headnote of a law report should deal only with principles and should eliminate the only too common feature of setting forth the adventures of A B and C. This series will be invaluable to the lawyer, who desires to keep thoroughly posted on British and Canadian law, and who is not content to search only in the reports of his own province. We find, on inquiry, that the decisions of the Privy Council on all Canadian appeals are to be included. The scheme does not conflict with the publication by the various Law Societies of their own official reports, but aims, as a private enterprise, to give reports on cases within thirty days from their delivery and to so dispense with the necessity of advance notes of cases.

The same idea was brought forward a good many years ago by the late Christopher Robinson, K.C., and the late B. B. Osler, Q.C., both of whom strongly advocated the publication of all the Canadian reports in one series and the supplying of same to members of the Law Society in Ontario, but the scheme was then dropped, as it was considered that the Ontario Law Society would have no authority to carry it out without legislative sanction.

The Dominion Law Reports should go far to perfect the confederation of the law courts of Canada, and one cannot doubt on reading the many references in the current reports to the decisions in other provinces that the policy of comity between the provincial courts is growing apace.

This is by far the largest and most important venture in the way of law reporting ever undertaken in this country and is unique in its comprehensiveness. It deserves and will doubtless receive the hearty support of the profession. The work is under the editorial management of Messrs. C. B. Labatt and W. J. Tremeear, barristers-at-law, assisted by a competent editorial staff.

HON. MR. JUSTICE KELLY.

With commendable promptitude, the new government at Ottawa has filled the vacancy in the Ontario High Court Bench, caused by the death of Mr. Justice MacMahon by the appointment of Mr. Hugh T. Kelly, K.C., of Toronto.

It is doubtless gratifying to him to know that his appointment has been well received by the profession. Other men might have been found who have had more experience as counsel, and who have been more prominently before the public in that capacity or in some other way; but it must be remembered that there are, after all, other matters for consideration in respect to judicial qualifications of still more importance, and in these we think the selection of Mr. Kelly may well be justified. He is a sound lawyer, a man of great industry and thoroughness, of high character and unblemished reputation, and well versed in the general business of the country.

As chairman of the Public Library Board and as a member of the Board of Governors of the University of Toronto, he earned the respect of his fellows, and fully met the expectations of his friends. Unassuming and dignified in manner, courteous and considerate, he will, we venture to think, be a judge before whom it will be a pleasure to practise.

The best incumbents of judicial positions are those who have a laudable ambition to be known by their brethren as good judges, and to be remembered by them and by others as men who have endeavoured to do justice without fear, favour or affection. We believe Mr. Kelly has that ambition, and congratulate him upon his promotion to the Bench.

He was born in the township of Adjala in the county of Simcoe in 1858, the son of Mr. John Kelly, a well-to-do farmer there. In 1873, (being a member of the Roman Catholic Church) he began his education in St. Michael's College, Toronto, graduating therefrom in 1880. In 1880, he began the study of the law, in the office of Foy & Tupper, composed of the present Attorney-General of Ontario and Mr. J. Stewart Tupper, now of Winnipeg, eldest son of Sir Charles Tupper. In 1887

he entered into partnership with Mr. Foy, the partnership continuing until his appointment to the Bench.

The management of the extensive practice of the firm of Foy & Kelly has been for many years under his supervision.

ACTION BY REPRESENTATIVES OF DECEASED WORKMEN.

There are some observations of Garrow, J.A., in the case of *Dawson* v. *Niagara, St. Catharines & Toronto Ry.* 23 O.L.R., pp. 675-6., which appear to have been concurred in by the full Court of Appeal, which are somewhat hard to understand. The learned judge seems to be of the opinion that no action can be taken by the representatives of a deceased workman under the Workmen's Compensation for Injuries Act. He says section 3 of that Act does not attempt to confer a right of action upon the widow, etc., all it does is to give the same right of compensation and remedies against the employer as if the workman had not been a workman. The workman himself is given a right to sue under the statute. It is as to him a new right, but, as to his representatives, the effect of the statute is simply to remove a difficulty out of the way. The action when not brought by him, but after his death, by his representatives, must thus rest for its basis upon the earlier Act (i. e., the Fatal Accidents Act), and upon it alone, although the amount recoverable is necessarily limited by the provisions of the later Act (i. e., the Workmen's Compensation for Injuries Act.)

It appears to us that in making these observations the learned judge has failed to give full effect to the words of section 7 of the Workmen's Act, which expressly provides that "the workman, or in case the injury results in death, *the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of,* nor in the service of the employer, nor engaged in his work." These words seem to give to the personal representatives and any persons entitled in case of death, the same right of action which the deceased himself gets under the Act. If, as the learned judge assumes, the section only removes out of the way of the deceased's repre-

sentatives the difficulty of the deceased being in the position of a servant of the defendant, and as such having no right of action; and the action by such representatives is only maintainable under the Fatal Accidents Act, then the logical conclusion appears to be that such and only such damages as are recoverable under the Fatal Accidents Act are recoverable in such an action; viz., the actual pecuniary loss occasioned by the death; but the learned judge while holding the action to be only maintainable under the Fatal Accidents Act, yet nevertheless reaches what appears to us to be the illogical conclusion that the damages in such an action are limited by the Workmen's Act, although, according to the learned judge's view, the representatives have no right of action under that Act. If they have no right of action under that Act, how can the damages recoverable by them under the Fatal Accidents Act, be limited by an Act under which, according to the learned judge they have no right of action? The positions seem inconsistent.

It is interesting, not to say amusing, to note the comments of the *Law Times* on the appointment of judges in England, in view of what takes place in this country. Our contemporary states that some vacancies on the County Court Bench have just been filled: "Both the promotions are excellent, and will be welcomed throughout the profession; but it is to be hoped that in future a little more expedition will be shewn by the Lord Chancellor in selecting candidates for the Bench. Nearly three months have elapsed since the death of His Honour Judge Willis, and, although a certain rearrangement of judges has been carried out in the meantime, that period is too long even for the most careful deliberation." The vacancy in the Ontario Superior Court Bench, owing to the death of Mr. Justice MacMahon, which occurred nearly a year ago, has only just been filled. Had such delay taken place in England, our brother would have some caustic remarks to make on the subject. In this country the Bench is too much made use of as a plaything for party politicians, and not sufficiently regarded as one of the great foundation stones supporting the nation's welfare.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

ADMIRALTY—TOWAGE CONTRACT—DEFECT IN TOWING GEAR—WARRANTY OF FITNESS OF TUG—EXEMPTIONS FROM LIABILITY.

In *The West Cock* (1911) P. 208, the Court of Appeal (Williams, Farwell and Kennedy, L.JJ.) have affirmed the decision of Evans P.P.D., (1911) P. 23, noted ante, p. 174.

PRACTICE—PARTIES—ADMINISTRATION ACTION—REAL ESTATE—CREDITOR'S ACTION.

In re James, James v. *Jones* (1911) 2 Ch. 348, a small point of practice on the subject of parties is settled by Warrington, J. The action was by a creditor for administration of the real and personal estate of a deceased person—and it was objected that as administration of the realty was asked, it was necessary that the plaintiff should sue on behalf of himself and all other creditors. The learned judge, however, overruled the objection, holding that since the Land Transfer Act, 1897, which contains similar provisions to those contained in the Devolution of Estates Act of Ontario, whereby the realty of a deceased person vests in his personal representative, it was no longer necessary that a creditor suing for administration of the realty should sue on behalf of other creditors.

DAMAGES—INTEREST—REFEREE'S REPORT—DATE FROM WHICH INTEREST RUNS—JUDGMENTS ACT 1838 (1-2 VICT. C. 110) SS. 17, 18.—(ONT. JUD. ACT, S. 116).

Astover Fluor Spar Mines v. *Jackson* (1911) 2 Ch. 355. This was an action for trespass to mines. By consent, on June 18, 1910, it was refered to a special referee to inquire as to the value of material taken by defendants from the plaintiffs' mines, making all just allowances for the cost and expense of bringing such material to the surface, and also whether the plaintiffs had suffered damage by reason of the defendants having rendered other minerals on the plaintiff's lands unworkable, the defendants to pay the amounts found due on such inquiry. The referee on June 1, 1911, found the amount due on each head of the inquiry, and the plaintiffs now moved for judgment in accordance with the report, and the question was whether the amounts found due bore interest from the date of the order of reference of the 18 June, 1910, or from report, or whether the interest would only run from the date of the judgment to be pronounced on the present motion. Eve, J., held that the order of the 18 June, 1910, was not an order

whereby a sum of money was payable and therefore interest did not run from its date, because that order was so framed as to necessitate a further order to pay; but he held that the order of reference practically embodied an agreement to pay what should be found due when certified, therefore interest should run from the date of the report.

COMPANY—REDUCTION OF SHARE CAPITAL—CONFIRMATION OF BY-LAW FOR REDUCTION OF CAPITAL—DISSENTIENT SHAREHOLDER—COMPANIES ACT, 1908 (8 EDW. VII. c. 69) s. 46.—(R. S. C. c. 79, ss. 54, 228)—(7 EDW. VII. c. 34, s. 13 (*a*), ONT.).

Re Thomas De la Rue & Co. (1911) 2 Ch. 361. This was a petition by a limited company to obtain the sanction of the court to a resolution for the reduction of the share capital of the company. The scheme of reduction differentiated between holders of the same class of shares to the extent that it provided for the paying off some and not others, and imposed upon the shareholders whose shares were to be extinguished the obligation to accept debenture stock in lieu of cash, and involved the advance to the company of the moneys to be utilized in redemption of the shares by the persons whose shares were to be redeemed. Eve, J., held that the scheme was within the power of the company under s. 46 of the Companies' Act, 1908 (see R. S. C. c. 79, ss. 54, 228, and 7 Edw. VII. c. 34, s. 13 (*a*) Ont.) and made the order asked, as being on the whole fair and equitable, but made it a term of the order that the costs of a dissentient shareholder, who had assisted the court by his criticism of the scheme should be paid by the company. We may note that under the Dominion Companies Act, by-laws for reduction must be approved by "the Minister" with the approval of the Treasury Board. The particular Minister referred to not being defined, though from the other parts of the Act, it would appear that the Secretary of State is probably intended. Under the Ontario Companies Act (7 Edw. VII. c. 34) no confirmation by any external authority of a scheme for reduction of capital appears to be necessary, so that a dissenting minority has no redress, which affords an illustration of the desirability of having one company law for the whole Dominion.

WILL—LIMITATION IN STRICT SETTLEMENT—DISCLAIMER OF LIFE ESTATE, PRECEDING ESTATE TAIL—NO PRESENT ISSUE IN TAIL—ACCELERATION OF ESTATE IN REMAINDER—CONTINGENT REMAINDERS ACT, 1877 (40-41 VICT. c. 33)—(1 Geo. V. c. 25, s. 31 (Ont.).

Re Scott, Scott v. *Scott* (1911) 2 Ch. 374 is what Warrington, J., calls a curious case. A testator devised land to his eldest son,

John, for life, with remainder to his first and other sons successively in tail male, with remainder to his grandson Walter, the son of his son Joseph, for life, with remainder over. After giving numerous legacies he gave his real and personal estate not otherwise devised or bequeathed to trustees upon trust to sell and convert and hold proceeds on specified trusts. John, the eldest son, disclaimed the life estate devised to him, but, though living and married he had no male issue, nor was there any prospect of his having any, consequently the estate tail could not take immediate effect. In these circumstances the grandson Walter claimed that his life estate was accelerated, subject to be divested in case issue in tail should be born to John, but Warrington, J., concluded that the effect of the Contingent Remainders Act, 1877 (see 1 Geo. V. c. 25, s. 31, Ont.) was to preserve the contingent remainder to the same extent as if a trustee to preserve the contingent remainder in tail had been actually appointed, and consequently that the life estate of Walter was not accelerated; but he further held that until issue in tail should be born, or the possibility of such issue should be at an end by the death of John, the rents and profits of the disclaimed life estate of John formed part of the testator's residuary estate.

TRADE MARK—MAKER'S SURNAME AS TRADE MARK.

In re Pope's Electric Lamp Co. (1911) 2 Ch. 382. This was an application by Pope's Electric Lamp Co. to register the name of "Pope" as a trade mark for lamps manufactured by the applicants. There was evidence that the name had become identified by user with the goods sold by the applicants, but Warrington, J., was of the opinion that the word was, for all essential purposes, the surname of the maker of the plaintiff's goods, and was not, in its nature, adapted to distinguish them from the goods of other persons of the name of "Pope" and could not become so adapted by user as to be capable of registration as a trade mark, and even if the name could be adapted to distinguish the plaintiff's goods, in the exercise of a sound discretion, the court ought not to make the order asked.

PRINCIPAL AND SURETY—CO-SURETIES—CONTRIBUTION — JOINT AND SEVERAL GUARANTEE—DEBT PAYABLE BY INSTALMENTS.

Stirling v. *Burdett* (1911) 2 Ch. 418. This was an action by some sureties against their co-sureties claiming contribution, in the following circumstances. The plaintiffs and defendants had jointly and severally guaranteed the payment of a debt of £15,000 and their respective liabilities were limited to various specified amounts. The £15,000 was payable in instalments, some of which had fallen due and had been paid by the plaintiffs. The amount so paid was more than their proportionate shares of the

instalments, but not as much as their proportionate shares of the whole debt, and Warrington, J., held that until they had paid more than their proportionate share of the whole debt, they could not call on the defendants for contribution. The action therefore failed.

COMPANY—MINIMUM NUMBER OF DIRECTORS—QUORUM—MINIMUM NUMBER NEVER APPOINTED—ALLOTMENT BY LESS THAN MINIMUM NUMBER OF DIRECTORS—INVALID ALLOTMENT.

In re Sly Spink & Co. (1911) 2 Ch. 430. This was an application in a winding-up proceeding for a rectification of the register of shareholders, on the ground that the shares allotted to the persons whose names were sought to be removed had been invalidly allotted by less than the minimum number of directors required by the articles of association. The articles provided that the number of directors should not be less than four nor more than eight, that the two vendors should be the first directors, that the first directors should have power before the first general meeting to appoint additional directors, but so that the number should not exceed seven; that continuing directors might act, notwithstanding any vacancy, and that three should be a quorum. The two first directors appointed a third and the three held board meetings and allotted shares, including 2,000 allotted as fully paid up to Macdonald, the promoter, by way of commission for his services. Macdonald had transferred some of these shares to Herstlet partly as a gift and partly in payment of costs, and others to bona fide purchasers. The company never really commenced business, and was ordered to be wound up on the petition of shareholders. The vendors who had acted honestly, paid all the debts of the company, and repaid the bona fide shareholders what they had paid, and took transfers of their shares. The liquidator moved to rectify the register by striking out the names of Macdonald and Herstlet, who had full notice of the articles of association, and Neville, J., granted the application, thus leaving the vendors the only shareholders of the company and enabling them to get back their property. The learned judge holding that as the minimum number of directors had never been appointed, the three directors who assumed to act could not be deemed to be continuing directors; or as constituting a quorum, and therefore the allotment of shares made by them was invalid.

VENDOR AND PURCHASER—TITLE—LAND PURCHASED BY TRUSTEES AS AN INVESTMENT UNDER POWER—NO EXPRESS POWER TO VARY INVESTMENTS—IMPLIED POWER TO VARY—SALE BY TRUSTEES—CONCURRENCE OF CESTUI QUE TRUST FOR LIFE, IN CONVEYANCE.

In re Pope (1911) 2 Ch. 442. This was an application under the Vendors and Purchasers Act to determine a question of

title. The vendor's title was derived from trustees who had purchased the land in question under a power contained in a settlement as an investment, and for the occupation of one of the cestui que trust, as tenant for life. The settlement contained no express power to vary the investment but the property being no longer required by the tenant for life, the trustees, with his consent, had sold it to the vendor. Two questions were raised by the purchaser:(1) In the absence of an express power to vary investments, had the trustees any power to sell at all; (2) If they had, was the tenant for life a necessary party to the conveyance. Neville, J., answered the first question in the affirmative and the second in the negative. He held that a power to invest, where there is no special reason against it, implies a power to vary investments, and there being no special reason against it in this case, the trustees had power to sell. And though under the Settled Land Act, s. 56, the tenant for life had also power to sell, yet that did not put an end to the power of the trustees to vary the investment. He was therefore of the opinion that both the trustees and the tenant for life, had power to sell. And assuming that the consent of the tenant for life was necessary to a sale by the trustees, it was not necessary that the consent should be in writing, or that he should concur in the conveyance.

MORTGAGE—PRIORITY—MERGER—RELEASE OF PART OF SECURITY.

In *Manks* v. *Whitley* (1911) 2 Ch. 448 the plaintiff claimed priority as mortgagee in the following circumstances. Ogden being owner of the land in question in 1900, mortgaged it to Ackroyd for £300. In 1901 he mortgaged it to plaintiff for £120. In 1905 he mortgaged it again to Ackroyd for £172. In 1907 Ogden agreed to sell the property to Whitley; Whitley was informed that the only incumbrances were the two mortgages to Ackroyd. In order to pay off the first mortgage Whitley borrowed £300 from Farrar and Whitley paid off the second mortgage. The transaction was carried out by Ackroyd reconveying to Ogden. Ogden then conveyed to Whitley and Whitley mortgaged to Farrar to secure £300 advanced by him to pay off Ackroyd's first mortgage. In these circumstances the plaintiff contended that the first mortgage not having been kept on foot, but the mortgagee having reconveyed to Ogden and he having conveyed to Whitley free from the Ackroyd first mortgage, it was extinguished, and the second mortgage of the plaintiff acquired priority; but Parker, J., held that the transaction having taken place without notice of the plaintiff's mortgage, it could not be supposed that there was any intention to merge or extinguish the mortgage, and that Whitley and Farrar were entitled to be subrogated to the rights of the first mortgagee. Another point in this case was this: the plaintiff besides the mortgage above

referred to, had also a collateral mortgage on other property. This latter property had with the concurrence of the mortgagor, been sold, and the plaintiff had released it from his mortgage and taken a new mortgage from the purchaser, and it was held that this transaction did not disentitle him to enforce his first mentioned mortgage. The learned judge on this point said: "It was argued that this transaction was in derogation of the rights of the defendants, Farrar and Whitley, to compel the plaintiff to marshal his securities in their favour. . . . The equitable right of marshalling has never been held to prevent a prior mortgagee from realizing his securities in such manner and order as he thinks fit."

ADULTERATION—CORPORATION—WARRANTY GIVEN BY CORPORATION—"REASON TO BELIEVE"—"PERSON"—LIABILITY OF CORPORATION FOR FALSE WARRANTY.

Chuter v. *Freeth* (1911) 2 K. B. 832. In this case the defendants, a corporation, were prosecuted for having sold milk with a false warranty that it was pure when in fact it was not. The prosecution was under a statute which provided that a person giving a false warranty should be liable to a penalty unless he proves that when he gave the warranty he had reason to believe that the statements or descriptions therein were true. The magistrate before whom the information was laid, held that as a corporation could not believe it was incapable of committing the offence; but the Divisional Court (Lord Alverstone, C. J., and Pickford and Lush, JJ.) held that this was too narrow a construction of the Act, and that if a corporation is capable of giving a warranty, it is liable to the penalty if it is false; and as there is no reason why a corporation cannot give a warranty through its agents, so there is no reason why, through its agents, it cannot believe or not believe in its truth or falsity.

TRESPASS—JUSTIFICATION—ACT DONE IN PRESERVATION OF TRESPASSER'S PROPERTY—ACTUAL NECESSITY—REASONABLE ACT.

In *Cope* v. *Sharpe* (1911) 2 K. B. 837, on a former report of this case (1910) 1 K. B. 168 (noted ante, vol. 46, p. 171), a new trial was ordered. The facts were that the defendant in order to protect his master's shooting rights, for the purpose of staying the spread of fire over the land over which the rights existed, had set fire to patches of heather at some considerable distance from the main fire. The plaintiff, the owner of the land, claimed that this act amounted to a trespass. On the new trial of the action the jury made two apparently inconsistent findings. It found that the act of the defendant was not necessary for the protection of his master's property. and they also found that in the circum-

stances it was reasonably necessary. The County Court judge acting on the latter finding dismissed the action, but the Divisional Court (Phillimore, Hamilton, and Stratton, JJ.) thought the first finding should prevail and gave judgment for the plaintiff for nominal damages and an injunction. The Divisional Court thought that what the jury meant by their second finding was merely that the defendant had done the act in such circumstances as a reasonable man acting bona fide would consider necessary, but they held that if the act was not in fact necessary then it could not be justified merely by a bona fide belief that it was on the part of the trespasser.

PRACTICE—SERVICE OF WRIT OF SUMMONS—INDORSEMENT ON WRIT OF DATE OF SERVICE—PROCEEDINGS BY DEFAULT—RULE 62—(ONT. RULE 150).—IRREGULARITY—NULLITY.

Hamp-Adams v. *Hall* (1911) 2 K. B. 942 is a case which illustrates the importance of complying with the rule requiring the date of service to be indorsed on a writ of summons; see Ont. Rule 150. In this case the indorsement had not been made, and the defendant not having appeared, the plaintiff signed judgment for default of appearance and assessed damages, and on the application of the defendant the judgment and assessment were set aside, as being, not a mere irregularity, but a nullity,—the court holding that the omission of the indorsement of service as required by the Rule disabled the plaintiff from proceeding under the Rules for default of appearance. The Court of Appeal (Williams and Buckley, L.JJ.) reversed the order of Bucknill J., who had refused the defendant's application.

PASSING OFF—"GET-UP" OF GOODS—USEFUL BUT UNPATENTABLE COMBINATION—ARTICLE IN COMMON USE—INJUNCTION.

In *Edge* v. *Niccolls* (1911) A.C. 693, the House of Lords (Lord Loreburn, L.C., and Lords Gorell, Robson and Atkinson), have been unable to agree with the decision of the Court of Appeal (1911) 1 Ch. 5 (noted ante, p. 175). The action, it may be remembered, was to restrain the defendants from imitating the "get-up" of plaintiff's goods. The goods in question were laundry blue which the plaintiffs sold in canvas bags with a small stick attached thereto, it being shewn that this particular style of get-up had become a distinctive feature of the plaintiff's goods. The defendants did up their goods in a similar style, the only difference being that they attached to the bags a label bearing their own name. The Court of Appeal thought that the stick being a useful but unpatentable device could not be regarded as part of the get-up of the article, but their Lordships thought otherwise and granted the injunction prayed.

EJECTMENT—DOMINION LEASE TO PLAINTIFF—DECEIT—LESSEE TAKING WITHOUT NOTICE OF PREVIOUS GRANT.

Vancouver v. *Vancouver Lumber Co.* (1911) A.C. 711. This was an action concerning Deadman's Island, which had formed part of Stanley Park, Vancouver, and appears to have been a fruitful source of litigation for some years past. The action was for ejectment against the city of Vancouver, and the plaintiffs were a lumber Company claiming under a lease from the Dominion Government made in 1899. It appeared that the island, assumed to be part of a military reserve, had, by an order in council of 1887, been permitted to be used by the city of Vancouver for a public park, subject to the right of the Government to resume possession if required. The city entered into possession and used the island for park purposes, but certain squatters also seem to have entered whom the city, for want of title, found they could not eject. Negotiations took place with the view to a lease being granted, which was refused. Up to this time there had been no reference to the island by name or otherwise in the communications passing between the city and the Government. In 1899 a lease of the island for 25 years was made by the Government to the plaintiffs at a yearly rent of $500. On the city learning of this lease they asked the Government to revoke it, on the ground that the island was included in the property covered by the order in council of 1887; and in answer the Minister of Militia replied that the island had not been considered part of the military reserve; thereupon a writ was issued by the Attorney-General for the Province of British Columbia against the plaintiffs in the present action, claiming that the land belonged to the Crown in right of the Province, but this failed and the land was adjudged to belong to the Dominion. Further negotiations with the Dominion Government resulted in the order in council of 1887 being cancelled, and in August, 1906, a 99 years' lease was recommended by order in council of the Dominion Government to be made to the city of the military property known as Stanley Park, which lease was ultimately executed in 1908. The city relied on its possession as against the prior lease of the plaintiff, which on appeal they claimed was invalid (1) for want of being under seal and (2) as having been obtained by deceit of the Crown. But both points failed, the first because it had not been taken in the court below, and the second because it was not shown that the plaintiffs when taking their lease in 1899 had any notice of the claim of the city.

REDEMPTION—POWER OF SALE—DUTY OF MORTGAGEE—INADEQUACY OF PRICE—NO CHARGE OF COLLUSION AGAINST PURCHASERS—PLEADINGS.

Haddington Island Quarry Co. v. *Huson* (1911) A.C. 722. This was an action of redemption, the plaintiffs alleging that a sale of the mortgaged property under a power of sale was invalid, by reason of the alleged inadequacy of the price obtained. The Court of Appeal of British Columbia had held the sale bad, and given judgment for redemption; but the Judicial Committee of the Privy Council (Lords Macnaghton, Shaw, Mersey, DeVilliers, and Robson) reversed the decision, as it appeared that the pleadings contained no allegation that the purchasers were in any way guilty of fraud, collusion or bad faith, and that there had been no notice to the defendants before trial that inadequacy of price would be relied on, and the court of first instance had found the sale to have been valid and regular. In these circumstances their Lordships held the judgment at the trial ought not to have been reversed, and that the omission of the defendants to produce counter evidence as to the adequacy of the price, did not justify a finding that the sale was fraudulent.

EXTRADITION—R.S.C. c. 155, s. 10—REQUISITION FOR ARREST—EVIDENCE.

Attorney-General for Canada v. *Fedorenko* (1911) A.C. 735. The Chief Justice of Manitoba had, on the sworn information of a police officer, issued his warrant for the committal of the defendant on a charge of murder, for the purpose of extradition under the Extradition Act (R.S.C. c. 155) s. 10. The defendant subsequently applied to be discharged and his application was granted by Robson, J., on the ground that there had been no evidence before the Chief Justice of any diplomatic requisition for the extradition of the defendant, without which he held the defendant could not be legally committed under the Act; but the Judicial Committee of the Privy Council (Lord Loreburn, L.C., and Lords Haldane, Macnaghten, Shaw, DeVilliers, and Robson) held that the warrant for committal was properly issued by the Chief Justice under the statute, and that proof of the diplomatic requisition was unnecessary, and that the statute in no way contravened the treaty with Russia, under which the extradition was sought.

CANADIAN RAILWAY ACT, 1903, ss. 42, 242—ACTION FOR DAMAGES—REMOVAL OF SIDING—RAILWAY BOARD'S FINDING OF FACT—EVIDENCE—LIMITATION OF ACTION.

Canadian Northern Ry. v. *Robinson* (1911) A.C. 739. This was an action brought by Robinson against the railway company

to recover damages for removing a siding and thereby depriving the plaintiff of certain conveniences for the shipment of their goods to which they were entitled, in the following circumstances. The railway company had constructed a spur or siding from their railway into the plaintiff's premises. In October, 1904, the defendants wrongfully (as the Railway Board subsequently held) removed the siding, and it was not restored until after the Board had directed its restoration in September, 1906. The plaintiffs claimed damages for their deprivation of the siding between October, 1904, and September, 1906. The action was commenced in 1908. The defendants contended that under s. 242 (now R.S.C. c. 37, s. 306), the action was barred because not brought within one year next after the damage complained of was sustained; and they also claimed that no action lay for any damages sustained before the order of the Railway Board directing the restoration of the siding. At the trial the plaintiff succeeded and the judgment at the trial was affirmed by the Court of Appeal for Manitoba, and this judgment was affirmed by the Supreme Court of Canada, a minority of the judges of the latter court, however, dissented on the ground that the action was barred under s. 242. The Judicial Committee of the Privy Council (Lords Haldane, Macnaghten, Shaw, DeVilliers, and Robson) affirmed the judgment of the Supreme Court, their Lordships holding, first, that the finding of the Railway Board that the plaintiffs had been unreasonably deprived of the siding was conclusive and not controvertible in this action; and they also held that section 242 did not apply because the act complained of was not an act done in the construction or operation of the defendants' railway; the removal of the siding not being, in their Lordships' opinion, an act done in the course of operating the railway itself.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] [Oct. 3.

ROSS *v.* CHANDLER.

Partnership—Principal and agent—Partnership funds—Third party—Notice—Inquiry.

R., a member of the firm of R. M. & Co., engaged on a contract for railway construction in Quebec, shortly before its completion went to Ontario, leaving his partners to finish the work, collect any balance due, pay the liabilities and divide the balance among them. M. & C. finished the work and received $56,000 and over, went to Toronto and formed a new partnership of which R. was not a member. Having undertaken another contract in North Ontario, they arranged with the head office of the Imperial Bank to open an account with its branch at New Liskeard and the cheque payable to R. M. & C. was cashed at the branch in Toronto, and by instructions to the New Liskeard branch was placed to the credit of the new firm there and the whole sum was eventually drawn out by the latter firm. R. later brought an action against M. & C. for winding up the affairs of their co-partnership and, pending that action took another against M. & C. and the bank, claiming that the latter should pay the amount of the cheque with interest into court subject to further order.

Held, affirming the judgment of the Court of Appeal (19 O.L.R. 584), Idington and Anglin, JJ., dissenting, that M. & C. had acted within their authority from R. by obtaining cash for the cheque; that there was nothing to shew that they had misapplied the proceeds or intended to do so by their dealing with the cheque; that in any case there was no notice to the bank of any intention to misapply the funds and nothing to put them on inquiry; and that the action against the bank must fail.

Appeal dismissed with costs.

Lafleur, K.C., and *W. A. Mason,* for appellant. *Rose,* K.C., for McRae and Chandler. *Bicknell,* K.C., for Imperial Bank.

Ont.] [Oct. 3.

MORANG *v.* LE SUEUR.

Contract—Literary work—Publisher and author—Obligation to publish.

In 1901 M. & Co., publishers of Toronto, and L., an author in Ottawa, signed an agreement by which L. undertook to write the life of the Count de Frontenac for a work entitled "Makers of Canada" in course of publication by M. & Co.; the latter agreed to publish the work and pay L. $500 on publication and a like sum when the second edition was issued. This contract was carried out and the publishers then proposed that L. should write, on the same terms, the life of Sir John A. Macdonald, for which that of William Lyon Mackenzie was substituted. L. prepared the latter work and forwarded the manuscript to the publishers, who refused to publish it as being unsuitable to be included in the "Makers of Canada." L. then tendered to M. & Co. the amount paid him in advance for his own work and demanded a return of the manuscript, which was refused, M. & Co. claiming it as their property. In an action by L. for possession of his manuscript,

Held, affirming the judgment of the Court of Appeal (20 O.L.R. 594), Idington and Anglin, JJ., dissenting, that he was entitled to its return.

Held, per Fitzpatrick, C.J., that the property in the manuscript (or what is termed literary property) has a special character distinct from that of other articles of commerce; that the contract between the parties must be interpreted with regard to such special character of the subject-matter; that it implies an agreement to publish if accepted; and when rejected the author was entitled to treat the contract as rescinded and to a return of his property.

Held, per Davies and Duff, JJ., that there was an express contract for publication on breach of which the manuscript should be returned.

Held, per Duff, J., that the publishers could be treated as trustees of the manuscript for publication and that purpose failing there was a resulting trust in favour of the author.

Appeal dismissed with costs.

Hellmuth, K.C., for appellants. *Lafleur,* K.C., for respondent.

Ont.] [Oct. 3.

CLARKE *v.* BAILLIE.

Broker—Stock carried on margin—Right to pledge.

A broker who carries stock on margin for a customer has a right to pledge it for his own purposes to the extent of the amount he has advanced.

If the broker pledges such stock as security for an amount greater than his advances he is not guilty of a conversion provided that on demand of his customer he delivers to the latter the number of shares ordered and which he has been carrying for him. Anglin, J., dissenting.

Per Anglin, J.:—The broker must at all times be in a position to hand over the stock to his customer, and if, when he pledges it, he is not in that position, he is guilty of conversion.

Judgment of the Court of Appeal (20 O.L.R. 611), affirming that of the Divisional Court (10 O.L.R. 545), affirmed. Appeal dismissed with costs.

Nesbitt, K.C., and *Wood*, for appellant. *Hellmuth*, K.C., and *Long*, for respondent.

Province of Nova Scotia.

SUPREME COURT.

Meagher, J.] [Nov. 20.

GRAHAM *v.* BIGELOW.

Sales—Contract for goods of specified quality—False and fraudulent marking—Fixing damages—Market intended.

Plaintiff purchased from defendant a large quantity of apples of specified grades and quality defendant being aware that the apples were intended for shipment to England for sale there during the holiday season. Plaintiff became aware shortly after the delivery of the apples that they were not of the quality contracted for and indicated by the marks upon the barrels and proceeded to have them repacked. Owing to the delay caused by the re-packing and the additional handling to the fruit incident thereto the fruit did not reach the market for which it was intended until after the end of the season, when the price had materially fallen.

Held, that defendant by reason of his misconduct was responsible for the delay and was liable in damages and that in estimating the amount of such damages the English market must be taken to have been the one that both parties had in view.

Ritchie, K.C., and *Pineo,* for plaintiff. *Roscoe,* K.C., for defendant.

Meagher, J.] [Nov. 20.

ANDERSON *v.* MAUDE.

Arrest—O. 44, r. 3—Discharge from arrest—Construction of words "or for such other relief, etc."—Trial.

O. 44, r. 3 provides that a defendant who has been arrested under an order in the nature of a capias may at any time apply to rescind or vary it or to be discharged from custody "or for such other relief as may be just."

Held, that the latter words of the rule are not to be regarded as meaning only the same thing as the words which precede them but may fairly be taken to mean some relief not directly covered by the preceding words of the rule.

Defendant who was engaged in an occupation which took him frequently from place to place was arrested at a late hour of the night, when he was without legal advice, and being apprehensive that he might have to go to jail paid the amount of the claim but with an intimation that he intended to dispute it.

Held, 1. That his position was practically the same as if he were in custody and that he was entitled to a trial at the earliest possible moment.

2. That plaintiff must be required to go to trial within ten days, after pleadings were closed, failing which an order would pass directing re-payment of the money deposited with the sheriff.

J. M. Davidson, for plaintiff. *Bell,* K.C., for defendant.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] [Nov. 6.

GAAR SCOTT *v.* OTTOSON.

Contract—Order for chattels given under seal—Covenant to give mortgage on land in statutory form to secure purchase-money—Nature of relief to which covenantee entitled—Right of offerer to withdraw from purchase before acceptance—Vendor's remedies when purchaser refuses to complete purchase—Right of action for price of goods when property in them has not passed to the purchaser.

Held, 1. An order for the supply of goods executed under seal is not revocable before acceptance as an ordinary order might be: *Xenos* v. *Wickham*, L.R. 2 H.L. 296; *Watrous* v. *Pratt*, 30 O.R. 541, and Pollock on Contracts, p. 52; and, if the goods have been supplied, the vendor may sue for the price which the purchaser has covenanted to pay, notwithstanding the purchaser has attempted to cancel the order, returned the goods and refuses to carry out the purchase. In such a case the vendor is not restricted to an action for damages for the breach of contract. *Waterous Engine Works* v. *Wilson*, 11 M.R. 287, and *Sawyer* v. *Robertson*, 1 O.L.R. 297, followed.

2. When the contract provides that, if the purchaser should refuse to accept the goods or give the notes stipulated for, the whole purchase-money shall become due and payable forthwith, the purchaser may be sued for the whole price in either of said events, notwithstanding that the property in the goods has not passed to him by reason of a provision that the ownership of, and title to, the goods should remain in the vendor until the purchase price be fully paid.

The contract in this case further provided that, for the purpose of securing payment of the price of the machinery, the defendants would deliver to the plaintiffs a mortgage on certain land in the statutory form.

Held, that it should be declared that the plaintiffs have an equitable mortgage on the land to secure the money and that the plaintiff should have the ordinary judgment for foreclosure or sale as they may elect, with the usual inquiries, taking of accounts, etc., as in the case of an ordinary mortgage with the

statutory covenants, giving the defendants the statutory time, twelve months, to redeem; but that they were not entitled to a decree containing the usual provisions for the sale of the land to satisfy their lien or charge, and it was not necessary to require the actual execution of a mortgage by the defendants in order to give the plaintiffs full relief.

Stacpoole, and *L. J. Elliott*, for plaintiffs. *Mulock*, K.C., and *Thorburn*, for the defendants.

Full Court.] [Nov. 16.

DITCH *v.* DITCH.

Alimony—Separation deed—Proof of former marriage of plaintiff—Setting aside deed of wife on grounds of undue influence, lack of independent advice and mental weakness—Husband and wife—Acquiescence and delay before commencing action.

A deed of separation executed by husband and wife, containing mutual covenants that they will thereafter live separate and apart from one another, that each will not thereafter compel the other to cohabit with, and will not disturb, trouble or molest the other and will not claim any of the property or goods of the other thereafter, unless it can be declared void for any reason such as fraud, duress, want of understanding on the part of the wife, lack of independent advice, misrepresentation or undue influence, if followed by an immediate separation, requires no other consideration to support it and is a complete defence to a subsequent action by the wife for alimony. *Hunt* v. *Hunt*, 31 L.J. 161; *Flower* v. *Flower*, 25 L.T.N.S. 902; *Marshall* v. *Marshall*, 5 P.D. 19, and *Clark* v. *Clark*, 10 P.D. 188, followed.

There was no evidence of any fraud, duress, misrepresentation or undue influence inducing the plaintiff to execute the deed, and the parties had been living apart for three years, but the trial judge held that she was not bound by it because of some weakness of mind—her husband having had her examined twice as to her sanity although pronounced sane—for lack of independent advice, and because of her distress of mind caused by her own recent revelation to the defendant of an alleged former marriage, which the trial judge found had not taken place. He also held that the deed was without consideration and therefore void.

Held, Richards, J.A., dissenting, that there was nothing in

the evidence, a summary of which will be found in the judgments, to warrant a finding that the plaintiff was not quite sane or did not understand what she was doing or that the deed was void for any of the other reasons given.

Per HOWELL, C.J.M., and PERDUE, J.A.:—The deed having been acted upon by both parties and not impeached by the plaintiff until after the lapse of ten years, it should not be set aside except upon the clearest proof that she was induced to sign it by some influence which made it not binding upon her and the delay was sufficiently excused. *Sibbering* v. *Balcarras,* 3 De.G. & Sm. 735, and *Allcard* v. *Skinner,* 36 Ch.D. 145, followed.

Per HOWELL, C.J.M.:—The statements which had been previously made by the plaintiff, under the circumstances set out in the judgment, to her husband and other persons, authenticated by her statutory declaration and by the recitals in the deed, that she had been previously married to and had cohabited with another man, tendered so strongly to prove that her marriage to the defendant was void, that the onus was thrown upon her to give some independent evidence that the former marriage was a fiction, and should not be held to be displaced merely by her oath at the trial that such statements were false.

Maulson, for plaintiff. *A. B. Hudson,* for defendant.

Full Court.] [Nov. 20.

GAS POWER AGE *v.* CENTRAL GARAGE CO.

Pleading—Joinder of defendants—Joinder of cause of action arising out of tort with one arising out of contract.

Appeal from decision of MACDONALD, J., noted ante, p. 707, dismissed with costs.

Full Court.] [Nov. 20.

WICKS *v.* MILLER.

Evidence—Parol agreement superseded by written contract—Implied obligation—Expressum facit cessare tacitum—Parol evidence to contradict written document—Formal release of all claims of plaintiff.

Held, 1. Evidence should not be allowed to prove the terms of a verbal agreement between the parties, when they subse-

quently entered into a written agreement relating to the same subject-matter, although the latter has been lost and it cannot be proved by a copy; and, when the plaintiff claiming under the verbal agreement cannot remember the contents of the written agreement, and the evidence on the part of the defendant as to such contents is not credited by the trial judge, the result is that no agreement is proved, and the plaintiff must fail.

2. The presumption of law that two parties making a purchase of land for their joint benefit should contribute equally to the payments required should not be applied in a case where they have reduced their agreement to writing containing the terms on which they purchased together, even when those terms cannot be shewn in consequence of the writing having been lost. In such a case the maxim "expressum facit cessare tacitum" applies. *Merrill* v. *Frame*, 4 Taunt. 329, and *Mathew* v. *Blackmore*, 1 H. & N. 762, followed.

The plaintiff's assignor had given the defendant, long after the accruing of the latter's alleged debt sued for, a release to the following effect:—

"I agree to release T. W. Miller from all agreements made before this date between himself and me and acknowledge this as a receipt in full for all moneys due me to date."

Held, that evidence contradicting the meaning of this writing and limiting its application to a particular set of items so as to exclude the debt sued for ($2,000), should not have been received at the trial, in the absence, at all events, of any proof of fraud, mistake or some other invalidating influence present in the transaction. *Jackson* v. *Drake*, 37 S.C.R. 315, followed.

Trueman, for plaintiff. *A. B. Hudson* and *H. V. Hudson*, for defendant.

KING'S BENCH.

Mathers, C.J.] [Nov. 10.

LAFVENDAL *v.* NORTHERN FOUNDRY & MACHINE CO.

Negligence—Use of defective materials—Degree of care required in inspection of materials put into a building—Presumption of negligence—Res ipsa loquitur.

In the course of his employment as a carpenter in the erection of a building for the defendants, the plaintiff had to walk along the top of one of a number of wooden joists 18 feet long, 10 inches wide and 6 inches thick, fixed in an upright position 25 feet from the ground. When the plaintiff reached the centre of

this joist, it broke across the broad surface in a diagonal splinter about 6 feet long, and the plaintiff fell to the ground, receiving serious and permanent injury. As the joists were delivered at the building, they were inspected by the foreman, whom the trial judge found to be an experienced, competent, careful and efficient man. He had rejected quite a number of them for different reasons and the trial judge found that, although he did not submit them to any test, or even to a careful visual examination, his examination was sufficient to ascertain whether they were straight and of the proper length or had any other defects apparent to a person standing by and looking at them as they were being handled. They had also to pass through the hands of a number of other workmen before they were finally placed in position, but no one noticed the defect in that particular joist before the accident.

Held, that the law presumes that there was negligence in making use of such defective material, that the defendants might, however, rebut that presumption by shewing that, in the selection of the joists, they had taken reasonable care to provide against defective materials being used; and that the finding upon the evidence should be that the breaking of the joists was due to a latent or concealed defect not discoverable on reasonable inspection; that the defendants and their foreman had adopted a reasonably sufficient mode of inspection and had exercised all that reasonable care and diligence that might be expected of a reasonably prudent man under the circumstances, and that the plaintiff, therefore, could not recover.

Labatt on Master and Servant, par. 14, 15; Thompson on Negligence, par. 3767, 3774; *Ormond* v. *Holland,* E. B. & E. 102; *Heaven* v. *Pender,* 11 Q.B.D. 507, and *Richardson* v. *Great Eastern Ry.,* 1 C.P.D. 342, followed.

Macneill and *B. L. Deacon,* for plaintiff; *Dennistoun,* K.C., and *P. C. Locke,* for defendants.

Robson, J.] [Nov. 10.

IN RE DAUPHIN ELECTION.

Application for recount—Mandamus to County Court judge to proceed—Return to clerk of the Crown in Chancery—Affidavit on application to County Court judge to order recount —Requirements of, under s. 193*—Swearing on information and belief not sufficient.*

The affidavit required by s. 193 of the Dominion Elections Act, R.S.C. 1906, c. 6, upon receipt of which the County Court

judge is to proceed to recount the ballots cast at an election of a member of the House of Commons, must be such as to make it appear to the judge that a deputy returning officer has done one or the other of the wrong things enumerated, and such requirement is not satisfied by the affidavit of an elector who merely states that he verily believes that such things had been done. All that was made to appear by the affidavit was the deponent's belief in certain facts, but the Act requires that the facts themselves must be made to appear by the affidavit. *Re North Cape Breton and Victoria Election,* 6 E.L.R. 37, 532, followed.

After the returning officer has made his return to the clerk of the Crown in Chancery, it is too late to apply, under s. 206 of the Act, to a judge of the King's Bench in Manitoba for an order compelling the County Court judge to proceed with the recount. *Bellechasse Election,* 17 Q.L.R. 294, and *Portneuf Election,* 1 Q.L.R. S.C. 268, followed.

Cooper, K.C., and *Meighen,* for applicant. *A. B. Hudson* and *Simpson,* contra.

Mathers, C.J.] [Nov. 13.

FRASER *v.* CANADIAN PACIFIC RY. CO.

Assignment — Building contract — Assignment by contractor without consent or knowledge of proprietor—Priority as between successive assignments—Notice to debtor.

One Garson entered into a contract in writing with a railway company for the erection of a number of stations. The contract provided that Garson should not assign it or sublet the work or any part of it without the written consent of the engineer. He, nevertheless, shortly after entering into the contract, made an arrangement with the plaintiff to the effect that the latter should construct the stations in his place and that he would turn over to the plaintiff the payments for the work as and when received from the company. The plaintiff then proceeded to do the work and completed it according to the contract. He did not notify the company of the arrangement between him and Garson. The company's officers knew that the plaintiff was doing the work, but had no reason to suppose that he was not doing it as Garson's manager or agent and gave no consent to any assignment. While the work was in progress, Garson gave the Imperial Bank an assignment of all his claims against the company for moneys then due or to accrue due to him from the company

and the bank at once gave notice of this assignment to the company. The company thereafter made payments of progressive estimates on the work to the bank and paid nothing to the plaintiff. When the bank took its assignment from Garson, it had no notice of the plaintiff's position, but, from about the time the first estimate was paid, it knew that the plaintiff was doing the work and that Garson from time to time transferred to him the progressive payments, with the understanding that they were to be handed over to the plaintiff.

Held, 1. The agreement between Garson and the plaintiff at most amounted to an equitable assignment of the money to be earned and the bank, having acquired priority for its assignment by first giving notice to the company, was not affected by its subsequent knowledge of the plaintiff's position, and was entitled to retain all money received and to receive the balance still unpaid by the company.

2. The plaintiff could, under the circumstances, have no claim against the railway company in respect of the work. *Burck* v. *Taylor*, 152 U.S. 649, and *In re Turcon*, 40 Ch. D. 5, followed.

George A. Elliott and *Macneil*, for plaintiff. *Curle* and *Bond*, for the company. *Fullerton* and *Foley*, for the Imperial Bank.

Province of British Columbia.

COURT OF APPEAL.

Full Court.] [Nov. 8.

REX *v.* DAY.

Criminal law—Speedy trial—Election—Change—Sheriff.

1. A person committed for trial and out on bail, appearing voluntarily with his counsel before a county judge and electing to be tried speedily cannot afterwards change his election so as to be tried by a jury.

2. The fact that the sheriff was not present on such occasion or that he did not notify the judge of the accused coming before him for election, does not invalidate such election.

3. An objection to a conviction by a civil court of a person for receiving property stolen from the navy, on the ground that such an offence should be dealt with by the naval authorities, is bad.

Therefore a motion for an order directing the county judge to state a case was refused.

Maclean, K.C., and *S. Henderson*, for accused, in support of the motion. *Aikman*, for the Crown, contra. *Pooley*, K.C., for the Admiralty.

Full Court.] [Nov. 20.

TURNER *v.* MUNICIPALITY OF SURREY.

Practice—Particulars—Interrogatories—On particulars refused, resort had to interrogatories.

Where a party, having asked for an dobtained an order for particulars, and the order was reversed on appeal, and then applied for discovery by interrogatories, the judge at chambers dismissed the application on the ground that the application was an attempt to gain by another means that which had already been refused.

Held, on appeal, that the judge was right.

Davis, K.C., and *McQuarrie*, for appellant. *Kappele*, for respondent, not called upon.

Full Court.] [Nov. 27.

BROOKS, SCANLON, O'BRIEN CO. *v.* RHINE FAKKEMA.

Master and servant—Amount paid by employer for medical attendance—Such expenditure considered by jury in reaching verdict—Res judicata.

In an action against an employer for injuries received by an employee, the evidence shewed that when the employee was injured the employers paid some $686.30 in conveying the injured man to the hospital and in defraying his medical expenses. Counsel for the employers brought this fact to the notice of the court and jury during the trial, when plaintiff recovered a verdict of $4,500. The company claimed the amount disbursed, sued and recovered judgment.

Held, on appeal, that counsel for the employers, when he mentioned the amount at the former trial, did so with a view

to mitigation of damages, and that the jury evidently so considered it in arriving at their verdict.

Woodworth and *Creagh*, for appellant. *Ritchie*, K.C., for respondent company.

Full Court.] [Nov. 29.

EASEFELT *v.* HOUSTON & JOHNSON.

Practice—County Court—Speedy judgment—Motion for—Defence raised in pleadings but not set out in affidavit opposing motion—Slip of solicitor—Discretion.

In an action on a promissory note the defence was, inter alia, misrepresentation. Plaintiff moved for speedy judgment and defendant opposed it, but omitted to state in the affidavit that one of the grounds of defence was misrepresentation.

Held, on appeal, affirming the order of the county judge, that the defendant should be allowed in to defend.

D. Donaghy, for appellant. *Dockerell*, for respondent.

Book Reviews.

Company Law. By W. F. HAMILTON, K.C., of the English Bar and PERCY TINDAL-ROBERTSON, of Lincoln's Inn, Barrister-at-law, with Canadian Notes by W. R. PERCIVAL PARKER, of the Canadian Bar. Third edition 1911. Toronto: Canada Law Book Company, Limited. Philadelphia: Cromarty Law Book Company. 1911.

Hamilton's Company Law having proved to be a work of great utility, it was decided to issue a special Canadian edition for use of practitioners throughout the Dominion of Canada. This Canadian edition has now been issued, in which the plan has been adopted of having Canadian notes follow the main chapters of the English text. As the larger part of the Canadian statute law, with regard to trading corporations, has been modelled after the various English statutes, it is most convenient to have both the English and Canadian cases dealt with in one book. Mr. Parker's extensive practice as a corporation lawyer makes him eminently fitted to be the author of the Canadian annotations.

The Canadian notes relate to all phases of corporation law usually covered by a text-book, and amongst the sub-divisions which call for special mention, we note the Procedure for the licensing of foreign corporations, Secret profits of promotors, Ontario Legislation regarding prospectuses, the Powers of provisional directors, allottment of shares, Debenture stock, Floating charges, Shareholders' meetings and Winding-up procedure.

We heartily commend this new British-Canadian text to all who are interested in Canadian corporations. A feature which will be found to be of great convenience is the addition of appendices containing forms for use in obtaining incorporation in Ontario and forms for extra provincial licenses in British Columbia and Ontario. An elaborate index of over one hundred pages completes the volume.

The Law of Libel and Slander, and of Actions for words causing damage. By W. BLAKE ODGERS, K.C., Recorder of Plymouth, with Canadian Notes by W. J. TREMEEAR, of the Canadian Bar. Fifth edition. London: Stevens & Sons, Limited. Toronto: Canada Law Book Company, Limited. Philadelphia: Cromarty Law Book Company.

To the lawyer who has charge of a libel and slander case the latest edition of Odgers on Libel is almost indispensable. Probably in no branch of the law has there been such a thorough amendment of both the principles and practice during the last decade, as in the subject of this well-known text-book. The harshness and inadequacy of the English common law has been followed by remedial statutes in every Canadian Province and many of these are adapted from the British legislation which is fully dealt with in the text. The practice in civil actions for libel and slander has, as a result re-acquired any ratio of technicality which it may have lost when the Judicature Acts were passed. Whatever may be his practice in drafting his pleadings in other cases, the practitioner must beware, when pleading in an action for libel or slander, or he will find his case very materially prejudiced at the trial through his inattention to technical details.

The Canadian Notes at the end of each chapter cover all of the more recent cases in every Province. The Quebec decisions are included, as in many respects the Quebec law corresponds with the English law. An instructive decision by Judge David-

son of Montreal on this subject, as regards the law of "Qualified Privilege" is cited on page 306*i* and 306*j*.

The general index and the index of the Canadian Notes are both models of what an index should be. The subjects of Justification, Fair comment, Public meetings, Special damage, Injunctions, Privilege, Mitigation of damage, Disparagement of property, Contempt of court, Criminal libel, and the practice generally in both civil and criminal matters coming within the scope of the work, are discussed in a very practical and satisfactory way.

British Ruling Cases, from the courts of Great Britain, Canada, Ireland, Australia and other divisions of the British Empire (Annotated). Vol. I. Rochester, N.Y.: The Lawyers' Co-operative Publishing Company. Toronto, Canada: Canada Law Book Company, Limited. 1911.

This series of selected cases, to be quoted by the letters "B. R. C.," is a continuation, as to England, of the series completed in 1907, known under the title of English Ruling Cases; but in the British Ruling Cases the more important decisions in the appellate courts of other parts of the Empire are to be included. Volume 1 of this new series contains such well-known cases as *Reynolds* v. *Ashby*, dealing with fixtures in relation to conditional sales; *South Wales Miners Federation* v. *Glamorgan Coal Company*, as to breaches of contract through trade unions; *Quinn* v. *Leatham*, and *Taff-Vale Railway Company* v. *Amalgamated Railway Servants*, relating to the same subject; the famous cash carrier case, *British Conveyor* v. *Lamson Store Service Co.*, dealing with the law of maintenance as regards the protection of customers against trade rivals.

All these cases are very fully annotated with references to other recent cases in Great Britain, Canada and the United States. Amongst the Canadian cases reported in full in Volume 1, are *Lovitt* v. *Attorney-General of Nova Scotia*, a succession duty case; *R.* v. *Brooks*, the British Columbia "Zionite" case; *Fahey* v. *Jephcott*, to which is appended a very instructive note as to the liability incident to employing in factories, children under the age specified in the Ontario Factories Act; *Laishley* v. *Goold Bicycle Company*, an Ontario case as to future commissions of sales agents; *Lewin* v. *Lewin*, a New Brunswick case as to next-of-kin; *O'Connor* v. *Halifax Tramway Co.*, a Nova

Scotia case as to continuous passage on street railway lines; and *Metropolitan Life* v. *Montreal Coal Company*, an important appeal from the Quebec Courts in an accident policy case.

The text and annotations in Vol. 1 cover one thousand pages and there are in addition separate indices to the decision reported and to the annotations. These annotations are written by the editorial staff of "The Lawyers' Co-operative" which is a guarantee that the same efficiency which marked the initial volume will be continued throughout the whole work, as was done in the series of American cases known as the "Lawyers' Reports Annotated." This series will prove very valuable to the Canadian Bar and will doubtless be frequently cited in our courts.

The Law of Domicile in its relation to Succession and the Doctrine of Renvoi. By NORMAN BENTWICH, Barrister-at-law. London: Sweet & Maxwell, Limited, Chancery Lane. 1911.

This book is founded on the essay which was awarded the Yorke Prize at Cambridge University in 1910, and is published in accordance with the terms of the prize. The writer expresses his acknowledgments to his old teacher, Dr. Westlake, for much of value in his book; but the information which he has gathered is from a variety of other sources as well; and such a subject necessarily calls for a familiarity with international law in other countries as well as in England.

The nine chapters into which the essay is divided are:—1. Historical introduction; 2. The English conception of domicile; 3. Real and personal property; 4. Administration of the estate; 5. The effect of domicile upon the distribution of the estate; 6. Limitations of the regulation of the succession by the law of the domicile; 7. Death duties and domicile; 8. The doctrine of the renvoi in succession .

Mr. Bentwich has already shewn his capacity as a legal text-writer in his books on "The Law of Private Property in War," and "The Declaration of London." What he writes is up-to-date and accurate, and clearly expressed.

The Law relating to the Reduction of the Share Capital of Joint Stock Companies. By PAUL F. SIMONSON, M.A., Barrister-at-law. London: Effingham Wilson, 54 Threadneedle Street, E.C.; Sweet & Maxwell, Limited, 3 Chancery Lane, W.C. 1911.

The time was when company law became specialized as a branch of commercial law. The time has come when it is found

desirable and convenient to specialize various branches of company law. This is one of them, and it will be a very helpful addition to the library of every professional man dealing with companies and that means now-a-days the whole legal profession. In addition to the legal propositions advanced, and fortified by authorities, the author gives a number of useful forms and precedents, thus making a very complete summary of the law on this subject. The index is more complete than is generally given and therefore much to be commended, a remark which appropriately describes the volume as a whole.

Bench and Bar.

JUDICIAL APPOINTMENTS.

Wilfred Burwell Jonah, of Sussex, in the Province of New Brunswick, Barrister-at-law, to be Judge of the County Court for the Counties of Kings and Albert in the said province, in the room and stead of Charles Wedderburn, resigned. (Nov. 25.)

Flotsam and Jetsam.

"GO ABOUT YOUR BUSINESS."—The old Temple clock in London bears a curious inscription, the origin of which is ascribed to a chance remark.

Some two hundred years or so ago a master workman was employed to repair and put in a new face upon the clock. When his work was nearly done he asked the benchers for an appropriate motto to carve upon the base. They promised to think of one. Week after week he came for their decision, but was put off. One day he found them at dinner in commons.

"What motto shall I put on the clock, your Lordship?" he asked of a learned judge.

"Oh, go about your business!" his Honour cried, angrily.

"And very suitable for a lazy, dawdling gang!" the clock maker is said to have muttered, as he retreated. It is certain that he carved "Go about your business" on the base.

The lawyers decided that no better warning could be given them at any hour of the day, and there the inscription still remains.—*Harper's Weekly.*

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